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UNITED STATES

Court of Appeals

FOR THE NINTH CIRCUIT

VERNON O. TYLER,
Appellant,
vs.
S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation,
Appellees.
No. 11983

WILLIAM LESLIE KOHL,
Appellant,
vs.
S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation,
Appellees.
No. 11984

ARTHUR J. SESSING,
Appellant,
vs.
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No. 11985

H. A. LASSITER and W. R. MORRISON,
Appellants,
vs.
GUY F. ATKINSON COMPANY, a corporation,
Appellee.
No. 12017

OWEN J. McNALLY,
Appellant,
vs.
S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation,
Appellees.
No. 12018

BRIEF OF APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, Judge

ALLEN, HILEN, FROUDE & DeGARMO
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JURISDICTION

Appellees concur that this Court has jurisdiction to consider these appeals under Title 28 U.S.C.A. §§ 1337 and 1291 (formerly Title 28 U.S.C.A. §§ 41(8) and 225a) and that the only statute, the validity of which is involved in these appeals is the Portal-to-Portal Act of 1947 (Title 29 U.S.C.A. §§ 251-262) and in particular §§ 9 and 11 thereof (Title 29 U.S.C.A. §§ 258 and 260).

STATUS OF THESE CAUSES
and
QUESTIONS ON APPEAL

After argument but before decision by this Court in Cause Nos. 11463, 11464 and 11465 (here Cause Nos. 11983, 11984 and 11985 respectively) and following decision but before entry of judgment of this Court in Cause No. 11312 (here Cause No. 12017) these causes were remanded to the District Court and there consolidated for hearing with Cause No. 12018 upon those matters arising under the Portal-to-Portal Act of 1947 (R. 40).

Appellees do not concur in Appellants' statement of the "Questions on Appeal" (Appellants' Brief, No. 11983, p. 30) and submit that in these five causes which have been here consolidated for purposes of hearing and argument there are but two questions before this Court:

1. Are §§ 9 and 11 of the Portal-to-Portal Act of 1947 constitutional?

2. Are the Appellees, under the provisions of §§ 9 and 11 of the Portal-to-Portal Act of 1947, relieved of any liability to Appellants or Appellants' assignors for or on account of Appellees' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended (Title 29 U.S.C.A. §§ 201-219)?

Both questions were answered by the trial court in the affirmative.

STATEMENT OF THE CASE

Since the "good faith" of Appellees is of vital importance and has been placed in issue upon these appeals, it is imperative the Appellate Court have the benefit of the same factual background as did the trial court.

It must be kept in mind at all times that during the years involved in these appeals the United States, in company with her allies, was engaged in the prosecution and defense of wars upon many fronts (R. 304). The Appellees, as contractors, had been engaged by the United States, through the War Department, to construct urgently needed military bases in the Aleutian Islands of Alaska upon the Islands of Adak, Shemya, Attu and Amchitka (R. 80) for the use of the military forces in the defense of the territorial possessions of the United States and the prosecution of the war with Japan (R. 306, 375). During the early stages of the work in 1942 and 1943 the military situation was desperate, and Appellees were under compulsion to proceed with work under their contracts as rapidly as possible. New laws and regulations were being enacted and promulgated with great frequency, in order to gear industry and labor to wartime necessities. It is in the light of this background that the acts of Appellees must be considered, as was done by the trial court.

As has been referred to in the briefs of Appellants, the case was tried below under a stipulation that:

> "(a) All evidence, documentary or oral, relating to any one of the defendants shall be deemed to relate to all of the defendants and all documents or communications sent to or received by one defendant shall be deemed to have been sent to, received by or come to the attention and within the knowledge of all other defendants. All information, knowledge, beliefs and actions of any of the defendants shall also be deemed to be the information, knowledge, beliefs and actions of all other defendants." (R. 41.)

Accordingly, the record must be so read and considered.

Commencing in August, 1942, the Appellee, Guy F. Atkinson Company, began the performance of construction

work in Alaska at Excursion Inlet under its Contract No. 7100 with the United States War Department (R. 80). In the performance of this contract no overtime was paid for work up to 44 hours in a work-week in Seattle or up to 48 hours in a work-week in Alaska (R. 113). By the Wage Stabilization Act and Executive Order 9250 the wages and salaries of employees were frozen as of October 3, 1942 (R. 116).

Under date of September 30, 1943, the Appellee, Guy F. Atkinson Company, entered into a new contract, No. 202 (Ex. 13), with the United States War Department, calling for work in the construction of military bases in the Aleutian Islands of Alaska at Adak, Shemya, Attu and Amchitka (R. 80). During the negotiation of this contract the Appellee was advised that it would be required and expected to follow the provisions of Circular Letter No. 2236 (Ex. 14, see App. B., p. 56, infra) relative to its Alaska employees, and Circular Letter No. 2390 (Ex. 15, see App. B., p. 60, infra) relative to its Seattle office employees (R. 83-91, 111-12), both of which were issued by the Order of the Chief of Engineers, and its attention was further called to the provisions of the manual and non-manual employment contracts attached to Contract No. 202, as Exhibits "D" and "E" (R. 81). *Each of these documents provided for overtime policies not in conformity with the provisions of the Fair Labor Standards Act, and it is conceded by Appellants that Appellees' actual overtime policies, of which Appellants complain, were in accordance with such documents.* Circular Letter No. 2236 provided with respect to overtime:

> "e. Group 'B' Employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they

are required to perform on the seventh consecutive day.

"f. Group 'C' Employees will be considered supervisory or executive employees, and will be expected to work any necessary number of hours (including work on Sundays) without payment of additional compensation." (Ex. 14.)

Similar provisions are to be found in Circular Letter No. 2390 (Ex. 15) and Exhibit "E" to Contract No. 202 (Ex. 13).

Because Contract No. 202 contemplated and called for a work-week of seven ten-hour days (Ex. 13, R. 114), as contrasted with the 48 hour work-week under its previous contract No. 7100 and by reason of the provisions of the Wage Stabilization Act and Executive Order No. 9250, a serious personnel problem was created (R. 115, 380-1).

Under date of June 28, 1943, Appellee, Guy F. Atkinson Company, had been advised by Exhibit 21 from Major C. C. Templeton, Corps of Engineers, Chief, Personnel Branch, as follows:

"Gentlemen:

"The following instructions have been received from the office of the Adjutant General, Washington, D. C., by Memorandum No. S5-101-43, dated 4 June 1943, and are quoted for your information and future guidance: '1.a. Problems frequently arise under cost-plus-fixed-fee contracts as to the applicability or interpretation of laws or Executive Orders affecting the labor costs of the contractor.

" 'b. Such problems have in the main been submitted for determination through the Contracting Officer in the case of private plants operating under cost-plus contracts or through the Commanding Officer of Government-owned, privately-operated plants. However, some contractors have submitted such problems direct to civilian agencies without clearance through the War Department.

" 'c. Since the War Department is responsible for the reimbursement of proper labor costs under these contracts, all such problems will be submitted through the Contracting or Commanding Officer. Such procedure should govern problems under Executive Orders Nos. 9240, 9250, and 9301; Fair Labor Standards Act; Walsh-Healey Act; Davis-Bacon Act; Copeland Act; 8-Hour Law; and other laws or orders, past or future, affecting labor costs.

" '2.a. If a ruling is required from a civilian agency it will be obtained by or through the War Department.

" 'b. Applications for approval of wage or salary adjustments or other rulings under Executive Order No. 9250 by contractors not included within the delegation of authority from the War Labor Board to the War Department Wage Administration Agency will be submitted to the War Labor Board or to the Bureau of Internal Revenue through the Contracting Officer. The same procedure will be followed with respect to application to the War Man Power Commission for interpretations under Executive Order No. 9301.

" 'c. With respect to all other laws and orders, necessary rulings of civilian agencies will be obtained by the War Department. Requests for such rulings are to be made through the Contracting or Commanding Officer.

" '3. This procedure is intended to expedite determinations when the War Department has issued governing rulings. In addition, since the War Department must pass upon the labor costs for reimbursement, unnecessary duplication of clearance is avoided.' " (R. 281-3.)

Having in mind this directive and in an attempt to comply with the provisions of its contract and proceed with the urgently needed work, Appellee prepared organization charts and wage schedules *which included regulations relating to overtime pay* and submitted them to the Contracting Officer for approval under date of October 20, 1943 (Ex. 22, Ex. 26, See App. B. pp. 74 and 77, infra).

By letter dated November 5, 1943 (Ex. 25, R. 128, see App. B. p. 76, infra) and by letter dated November 30, 1943 (Ex. 27, R. 128, see App. B. p. 78, infra) Appellee's organizational charts and schedules and pay policies were approved by the contracting officer and Appellee was instructed to submit applications for further adjustments to the War Labor Board and the Salary Stabilization Unit of the Treasury Department for their approval.

Commencing about December 1, 1943, the War Department entered into negotiations with the other Appellees for additional construction work in the Alaska area (R. 464) which ultimately resulted in Contracts No. 500, 501, 502 dated December 31, 1943, Contract No. 1360 dated February 16, 1945, and Contract No. 1499 dated June 25, 1945 (R. 462-3). Under the circumstances, and in view of Exhibits 25 and 27, the Contracting Officer instructed Appellee, Guy F. Atkinson Company, to make submission to the Salary Stabilization Unit and War Labor Board of a uniform salary structure for all Alaskan contractors (R. 131). The Appellee was further instructed to retain private counsel to assist in the presentation (R. 134). Accordingly, Appellee, Guy F. Atkinson Company, with the advice and assistance of the other Appellees and Alaskan contractors, prepared a submission to the Salary Stabilization Unit and the War Labor Board.

Upon presentation of the problem to the War Labor Board it was uncertain as to its jurisdiction (R. 137, 384). The matter was thereupon presented to the Salary Stabilization Unit of the Treasury Department (R. 137, 384-5). It advised, after considerable delay and near the end of February, 1944, that it would not accept a joint submission and that it would be necessary for each contractor to submit a separate application at the place of its home, or main office (R. 384-5).

Since the Contract No. 202 had been signed in September of 1943 and more than five months had passed without being able to secure a decision upon the wage scales to be employed in urgent military work, a conference of high military and civilian officials was called for Seattle (R. 385-8). At this meeting Major Bedell of the Civilian Personnel Division of the Army Service Forces and Mr. Curtis of the Labor Branch of the Office of the Chief of Engineers in Washington, D. C., advised that if the application be made to the Secretary of War's office, it would assume jurisdiction to determine the problem through the War Department Wage Administration Agency (R. 387-8). Accordingly, Appellee, Guy F. Atkinson Company, was instructed to withdraw the applications to the War Labor Board and Salary Stabilization Unit and submit all material to the Contracting Officer (R. 139). This was done on March 3, 1944 (Ex. 36).

In the meantime, and in an effort to secure an answer to some of the perplexing problems with which it and the other Appellees were faced, Guy F. Atkinson Company, through its Vice-President, Northcutt, wrote the Contracting Officer at the Seattle office of the District Engineer on December 23, 1943, inquiring:

> "2. Is there any reason why premium rates should have been paid for work in excess of forty hours per week under Contract No. W-869-eng-7100?
>
> "3. Is the payment of premium rates for work in excess of forty hours per week mandatory under Contract No. W-45-108-eng-202?" (Ex. 74.)

To this direct inquiry the Contracting Officer replied on April 13, 1944, as follows:

> "In answer to the second question, there is no reason why premium rates should have been paid for work in excess of 40 hours per week unless the work came under the jurisdiction of the Fair Labor Standard Act. Many

highly trained legal minds have pondered this question without arriving at a satisfactory conclusion. Obviously, the Chief of Engineers did not believe the Fair Labor Standards Act applied because the initial policy was that only straight time overtime be allowed for work in excess of 48 hours per week and then only to the lower grade employees. Grade B employees were allowed no overtime at all during the first six days of the week.

"Circular Letter No. 2390 is the result of this continuous argument about the application of the Fair Labor Standards Act. The wage and hour people claimed that it did apply and no authoritative answer could be obtained, *so the legal staff of the Chief of Engineers effected a compromise acceptable to the wage and hour people. This provided pay for the lower bracket employees in conformity with the provisions of the Act, but did not accept the application of the Act over all, as demonstrated by the straight-time overtime provisions of Grade B employees.* The only explanation of this is that it was a compromise agreement that such employees were semi-supervisory. The Act exempts supervisory employees, but nothing is said about semi-supervisory employees, so the debate is still unsettled. *The compromise did obtain the assurance that the wage and hour people would not press claims under the Act because of failure to pay time and a half overtime for the B Group.*

"Your third question is answered by the above, except that the mandatory part is derived from the directive of the Chief of Engineers that contracts negotiated after May, 1943, *shall use the compromise agreement."* (Italics supplied.) (Ex. 75.)

This definite assurance had been preceded by letters from the Contracting Officer of February 12, 1944 (Ex. 33, see App. B. p. 79, infra) and February 13, 1944 (Ex. 34, see App. B. p. 80, infra) dealing with Seattle office overtime and Alaska employees overtime, in which the following instructions were given:

> "Overtime pay shall be in accordance with the Chief of Engineer's Circular Letter 2390, a copy of which has already been furnished to you." (Ex. 33.)

and

> "It will be necessary for your non-manual employees to work any reasonable number of hours per day during the first six days of a week to fulfill their functions. However, no overtime benefits shall accrue on the first six days." (Ex. 34.)

Furthermore, Appellee, Guy F. Atkinson Company, through Mr. E. B. Skeels, its Job Manager, under date of March 18, 1944, had addressed an inquiry to the Resident Engineer in Alaska as follows:

> "Under the labor provisions of our contract, Article 8, paragraph b., Group 'B' employees are expected to work any reasonable number of hours during the first six days of the work week at straight time. We believe the interpretation of 'reasonable number' to be eight hours.
>
> In the interest of economy and general efficiency on the job, it is our opinion that numbers of non-manual employees in Group 'B' be required to work ten hours per day to conform to the hours of work of manual employees over whom the non-manual employees are exercising checking supervision. For the additional two hours per day we believe the non-manual employees are entitled to overtime payments in conformity with the provisions of the job contract and Executive Order No. 9240.
>
> Your favorable consideration is earnestly solicited." Ex. 39, see App. B, p. 82, infra)

to which a reply was received on April 12, 1944, stating:

> "Receipt of your letter of 18 March 1944 requesting approval for the payment of overtime to Group B non-manual employees is acknowledged.

Payment of overtime compensation to Group B nonmanual employees would be in violation of Executive Order No. 9240. For the payment of overtime, Government regulations define Group B employees as follows:

> 'Group B employees will be expected to work any reasonable number of hours six (6) days per week without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they are required to perform on the seventh consecutive day.'

This stipulation under Executive Order No. 9240 was made a part of your Contract W 45-108-eng-202 and is contained in paragraph d, Article VIII thereof.

This factor was taken into consideration when the field organization schedule of nonmanual employees under Contract W 45-108-eng-202 was established and approved for your Company. Accordingly, this Headquarters cannot approve the request contained in your letter of 18 March." (Ex. 40, see App. B. p. 83, infra.)

Through the Seattle office of the District Engineer, Corps of Engineers, the submission was made to the War Department, and through it to the War Department Wage Administration Agency (Ex. 42). This resulted in the so-called Abersold Directive of April 27, 1944 (Ex. 16, see App. B. pp. 63-71, infra). *By this directive specific approval was given to the overtime policies and practices as employed by Appellees throughout the performance of their contracts and of which Appellants complain as having been in violation of the provisions of the Fair Labor Standards Act.*

In the Abersold Directive, under a section headed as follows, appears:

"7. *Overtime Payments*:

> *b*. Group 'B' employees will be paid at the rate of straight time for all work which they are required

to perform in excess of 40 hours during the first six days worked of any regularly scheduled work week, and at the rate of two times straight time for all work which they are required to perform on the seventh day worked of such work week.

d. Group 'C' employees will work any necessary number of hours (including work on the seventh day) without payment of additional compensation." (Ex. 16.)

This directive was followed and complied with by Appellees.

As of the date of receipt of the Abersold Directive none of Appellees was of the opinion or belief that their operations were covered by the provisions of the Fair Labor Standards Act (R. 166, 167, 188, 317, 472).

Mr. Ray H. Northcutt, Vice-President of Appellee, Guy F. Atkinson Company, who had charge of the submissions to the War Labor Board and Salary Stabilization Unit of the Treasury Department, testified:

"Q. Mr. Northcutt, in these many conferences which you had—as you testified—with the representatives of the War Labor Board, the representatives of the Salary Stabilization Unit and these joint agency meetings in which representatives of all of the various persons interested in employment in Alaska participated, including the Labor Department, were you ever advised at any time that the policies embodied in these submissions were in violation of the Fair Labor Standards Act or any other statute? A. No, sir.

The Court: What did you do, if anything, to keep from violating the Fair Labor Standards Act?

The Witness: Do you mean at this time?

The Court: At any time, this time included.

The Witness: Before we engaged in the War Department contracts we consulted with our own main office and our attorneys, and the National office of the

Contractors Association to get information generally as to what work was covered by the Fair Labor Standards Act,—what of our activities might be covered by the Fair Labor Standards Act, and were advised that new construction was not covered; that if we were engaged in repair and maintenance of existing structures or facilities, that that would probably be under the Fair Labor Standards Act.

The Court: Is your present statement related only to non-manuals or related to all—

The Witness: Related to all of our construction activities; and that was prior to our engaging in these War Department contracts in Alaska and the Aleutians.

The Court: I am just concerned about them now because I don't believe any other contracts other than those are involved in this litigation.

The Witness: That is correct, sir. In this connection we depended upon the War Department and their Labor Relations Section and their legal advisers to advise us upon the applicability of all regulations in connection with this work,—partly as our own policy and partly because that is specified in our contract.

Every feature of our employment and employment conditions was directed by the War Department representatives. We were given no latitude in that regard and the War Department, we considered, was able and obligated to inform and instruct all CPFF contractors on that problem." (R. 141, 142.)

Further:

"The Court: The court would like to know why you feel you would have done so.

The Witness: Why, sir, the War Department represented themselves to us as the authoritative body to instruct us and direct us in all matters pertaining to labor, payment of wages, overtime and so forth, and we were given to understand by the War Department that

> they had taken and would continue to take all necessary steps with the Department of Labor and that all instructions and interpretations to us would emanate from the War Department, and until we heard to the contrary from the Department of Labor we would naturally and did in 1943, '44 and '45 follow the War Department on that basis." (R. 217, 218.)

Mr. Clifford T. McBride, the Business Manager of Appellee, Birch-Morrison-Knudsen, testified to the same effect:

> "A. We were given a contract by the government and a wage structure, and we didn't have any reason at all to believe that the War Department would direct us to do anything that would conflict with any other law." (R. 477, 478.)

Similarly, Mr. John I. Noble, who was Chief of the Contracts Projects Branch of the Alaska Division of the District Office, Corps of Engineers, testified:

> "Your Honor, may I point out that the Office of the Chief of Engineers had its headquarters in Washington, D. C., with a very large staff— presumably the most expert that they can obtain. That is the headquarters of the Corps of Engineers. They have branches of specialists —. Well, the legal branch and the labor relations branch. They are the ones who are looked to to coordinate with the Wages and Hours Division of the Department of Labor and other branches of the Government. When the Chief of Engineers issues a directive to a District Engineer saying '2236 and 2390 shall be incorporated in your contracts henceforward,' it is our assumption—it is certainly not my place to go back of the provisions and ask, 'Are these legal?' It is the assumption that they have cleared all of that ground and have taken any necessary steps to correlate with the departments of the Government." (R. 448-9.)

In the summer of 1944, a Mr. Cecil, a representative of the Wages and Hours Division of the Department of Labor, visited the offices of Appellee, Guy F. Atkinson Company,

in Seattle (R. 225, 226). His superior, Mr. Walter T. Neubert, testified that Mr. Cecil "had no authority to issue opinions." (R. 458.) Subsequent to this visit and an examination of the records of the office, a letter dated September 19, 1944, was received at the office of Appellee, Guy F. Atkinson Company, from Walter T. Neubert, Seattle Branch Manager, Wage and Hour Division, United States Department of Labor (Ex. 73). This letter read, in part:

> "Inasmuch as certain violations of the Fair Labor Standards Act have been disclosed in a recent inspection of your operations, it becomes necessary to ask you to compute overtime due certain employees."

With reference to his authority to determine the applicability of the Fair Labor Standards Act, Mr. Neubert testified:

> "A. I have no authority to initiate opinions. I have to pass them on." (R. 456.)

Following the receipt of the communication, Exhibit 73, the Appellee, Guy F. Atkinson Company, in conformity with the instructions contained in Exhibit 21 heretofore quoted, referred the matter to the War Department for action (R. 231; Ex. 76). Under date of October 3, 1944, the Contracting Officer, on behalf of the War Department, acknowledged receipt of the inquiry and, in part, stated:

> "You will be advised as soon as definite instructions are received." (Ex. 78.)

Subsequent to this acknowledgment nothing further was heard directly by Appellees from the War Department, or the Wages and Hours Division (R. 340, 474).

During the latter part of November, 1944, there was brought to the attention of Appellees a file of correspondence which had been initiated through a complaint by one George A. Parks, an employee of Birch-Morrison-Knudsen, to Senator Kenneth S. Wherry, that the employee had not been paid

proper overtime during his work in Alaska (Ex. 55). Senator Wherry referred this complaint to the Wages and Hours Division of the Department of Labor and received a reply direct from the Honorable L. Metcalf Walling, Administrator, reading as follows:

"U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington

September 30, 1944

Office of the Administrator
Honorable Kenneth S. Wherry
United States Senate
Washington, D. C.

Dear Senator Wherry:

A reading of the communication received by you from Mr. George A. Parks, 5102 Capital Avenue, No. 8, Omaha 6, Nebraska which you forwarded me on September 26, 1944, indicates that there is no action which should appropriately be taken by these Divisions with respect to the alleged misrepresentations to your constituent as to the number of hours he would be expected to work while employed by the S. Birch & Sons Construction Co. and Morrison-Knudsen Company, Inc., in the Aleutian Island area.

The only federal labor statute which might be found applicable to the work performed by your constituent is the Fair Labor Standards Act of 1938, commonly called the Wage and Hour Law. Mr. Parks has not claimed to be within coverage of that statute which, if applicable, would have required, as you know, payment of overtime rates for all hours worked by him in excess of 40 per week. The contract of employment apparently contemplates work in excess of 40 hours per week without payment other than the base compensation and obviously, therefore, the parties to that contract did not consider the Wage and Hour Act involved.

There are, of course, many exemptions provided for in the Fair Labor Standards Act. One of these exemptions extends to persons employed in bona fide, executive, administrative or professional capacities as defined by the Administrator. It occurs to me that that exemption may have been known to be applicable by the parties to the employment contract here involved.

Although the nature of the Alaskan project is not described in Mr. Park's letter to you, I deem it advisable to point out also that it is my opinion that employees of construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, I believe that employees whose work occupies them in the original construction of buildings are not generally within the scope of the Fair Labor Standards Act even if the buildings when completed will be used to produce goods for commerce. The Act applies, you will recall, only to those employees who engage in interstate commerce, produce goods for interstate commerce, or are necessary to the production of such goods.

It is my recommendation that since no claim has been made by your constituent to entitlement of overtime compensation by reason of a federal law that you seek advice from the War Department, Office of the Chief of Engineer. Perhaps more particular advice can be furnished you there with respect to this type employment contract.

I am returning your constituent's letter and employment contract as requested by you.

Sincerely yours,

L. METCALF WALLING
Administrator" (Ex. 55)

There was certainly no suggestion in this letter that Appellees were in violation of the Fair Labor Standards Act.

In February of 1945 the question of the application of

the Fair Labor Standards Act to the employees of Appellees was again brought up by the filing of certain claims by employees. These were referred to the War Department for opinion and produced a reply from Captain D. M. Pelton, Contracting Officer, which stated, in part, as follows:

> "After carefully considering the validity of the claims, it is the decision of the Contracting Officer that favorable action is precluded by existing War Department policies. The claims are accordingly denied in their entirety." (Ex. 63; R. 314.)

Insofar as the record in this case discloses, this stated policy of the War Department has never changed and inheres in the numerous exhibits in this record enunciating the policy of the War Department on litigation procedure. (See Ex. 57, 62, 63, 64, 65 and 79.)

In addition to the documents hereinbefore referred to, the exhibits in evidence disclose the proper channels of command through which all communications were handled. (See Ex. 23, 47, 49, 50 and 56.) The record contains numerous instructions received by Appellees indicating non-payment of overtime to non-manual employees (See Ex. 28, 41, 44, 45 and 46) and demonstrates the close supervision of the War Department over the activities of the Appellees relating to personnel problems (See Ex. 51, 61 and 67) including the prescribing of the forms of non-manual employment agreements used by Appellees (See Ex. 52, 53, 54, 60 and 66). The reliance of Appellees in good faith upon the instructions of the War Department, the Corps of Engineers and the Wage Administration Agency as regards other matters is also amply demonstrated upon this record. (See Ex. 29, 30, 31, 32, 36, 37 and 38.)

For the convenience of the Court we have set forth in Appendix B the material portions of those exhibits which are not quoted extensively in this Statement of the Case or else-

where in this brief and which we believe are best illustrative of the documents and communications received by Appellees from the Corps of Engineers, the War Department and the Wage Administration Agency and upon which Appellees acted and relied.

ARGUMENT

I.

Sections 9 and 11 of the Portal-to-Portal Act Are Constitutional.

Appellants having herein attacked the constitutionality of Sections 9 and 11 of the Portal-to-Portal Act, it is deemed advisable to meet this issue at the outset of our argument. The wealth of judicial expression uniformly rejecting the contention that the Act in any aspect violates the Fifth Amendment of the Constitution, makes it a work of supererogation to analyze or even list the cases. At an earlier date the Act had been held constitutional in over one hundred decisions. (See: *Sesse v. Bethlehem Steel Co.,* 4th Cir., 168 F. 2d 58, 61.) We shall confine our discussion to a brief disposition of the authorities cited and points raised by Appellants, statement of the constitutional principles involved, and reference to the more pertinent recent decisions under the Portal-to-Portal Act.

Appellees rely upon such cases as *Steamship Company v. Joliffe,* 2 Wall 450; *Ettor v. City of Tacoma,* 228 U.S. 148; *Coombes v. Getz,* 285 U.S. 434; but these cases are not in point, because they dealt with state statutes or constitutional provisions repealing prior state laws, (See: *Battaglia v. General Motors Corp.,* 2nd Cir., 169 F. 2d 254, 261), were concerned with vested property rights based on agreements (See: *Sesse v. Bethlehem,* 4th Cir., 168 F. 2d 58, 64), and involved rights which were relied on by the parties at the time of their transactions under former law (See: *McCalpin*

v. Magnus Metal Corp. (D.C., N.D., Illinois, July 1, 1948), 15 Labor Cases ¶J 64, 633; 46 Mich. L. Rev. 723). The case of *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, is not apposite, for it involved an attempt to abridge the substantive right of a mortgagee in specific property held as security (See: *Fisch v. General Motors Corp.,* 6th Cir. 169 F. 2d 266, 271). *Worthen v. Thomas,* 292 U.S. 426, concerned a state statute held void under the contract clause of Article 1 of the Constitution, which obviously does not apply to the federal government. *New York Central R. R. v. Gray,* 239 U.S. 583, held that under an agreement which became invalid by Act of Congress, the promisee who had performed services in reliance on the subsequently invalidated promise was entitled to recover the value of his services in another form from the promisor.

None of the above cases was directed at the power of Congress to regulate interstate commerce, in the exercise of which it enacted the Portal-to-Portal Act. In fact, the only decisions cited to sustain Appellants' argument wherein a regulation of interstate commerce was attacked, expressly recognized the great latitude of the congressional power in that regard and sustained its exercise in those instances. *United States v. Carolene Products Co.,* 304 U.S. 144; *North American Co. v. S.E.C.,* 327 U.S. 686. See also: *American P. & L. Co. v. S.E.C.,* 329 U.S. 90, wherein the court states, at p. 104, "the federal commerce power is as broad as the economic needs of the nation."

Certain constitutional principles, not adverted to by Appellants and which are fully developed in the cases hereinafter cited, should be briefly noted. Claims which are statutory and have not ripened into final judgment, whether or not the activities on which they are based have been performed, are completely subject to legislative action. *Western Union Tel. Co. v. Louisville & Nashville R. Co.,* 258 U.S. 13.

Even though existing laws are read into contracts and rights extended by statute may become in a sense contractual, the amendments to the statute by the same token become contractual terms—"the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 435. This rule is not limited to cases where the effect of the exercise of congressional power upon pre-existing contracts is only incidental. *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240. Congress may, in the exercise of its commerce power, destroy valid pre-existing private contracts; otherwise, "individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce." *Louisville & Nashville R. Co. v. Mottley,* 219 U.S. 467, 482. See also: *Fleming v. Rhodes,* 331 U.S. 100, 107.

We do not quarrel with Appellants' assertion that Congress, in the exercise of its commerce power, is limited by the due process clause of the Fifth Amendment. The point is, that the Portal-to-Portal Act does not contravene the Fifth Amendment, and the courts uniformly have so held. As is stated, for example, by the Court of Appeals for the Second Circuit in *Battaglia v. General Motors Corp.,* ,169 F. 2d 254, 261, certiorari denied Dec. 6, 1948, ... U.S. ....., 93 L. Ed. Ad. Op. 126:

> "This is not to say, of course, that Congress may exercise its commerce power in a discriminatory or arbitrary manner. We need not go so far. Faced with what it reasonably considered a situation relating to commerce that called for legislative action, Congress, after a thorough investigation, enacted the Portal-to-Portal Act. It cannot be said that, in so doing, Congress acted arbitrarily. It is not even suggested that it acted dis-

> criminatorily. Clearly the Act did not violate the Fifth Amendment in so far as it may have withdrawn from private individuals, these appellants, any rights they may (be) said to have had which rested upon private contracts they had made."

Accord: *Fisch v. General Motors Corp.,* 6th Cir., 169 F. 2d 266, 272, certiorari denied Jan. 3, 1949, ... U.S. .....

Appellants present what they say is an argument of first impression when they contend that regardless of the economic factors and conditions warranting enactment of the Portal-to-Portal Act so far as purely "portal" type activities are concerned, these considerations do not support the validity of Sections 9 and 11 when applied to ordinary wage and hours cases. This argument heretofore has been judicially considered and rejected.

In an "ordinary" action to recover overtime for work admittedly performed, and not involving "portal" activities, the court stated in *Jackson v. Northwest Airlines,* (D.C. Minn.) 76 F. Supp. 121 at 132:

> "Plaintiffs also argue that Congress' determination of an emergency cannot justify an invasion of plaintiffs' rights here.
>
> "The validity of the Portal-to-Portal Act of 1947 under the Federal Constitution has been determined many times on the same grounds urged by plaintiffs here and also on similar ones. * * * The arguments of plaintiffs have been considered. Sections 9 and 11 of the Portal-to-Portal Act are valid; they do not violate the Federal Constitution."

See also *Burke v. Mesta Machine Co.* (D.C., W. D. Penn.), 79 F. Supp. 588, involving non-portal type activities, wherein the identical contention was urged that the congressional "determination of an emergency cannot justify invasion of

plaintiffs' rights here," and was similarly rejected by the court.

It will be noticed from the congressional proceedings that more than ample factual and legal justification for the enactment of Sections 9 and 11 was found to exist. Vol. 93, Congressional Record, Feb. 27, 1947, p. 1491 et seq.; March 18, 1947, p. 2193 et seq.; May 1, 1947, p. 4388 et seq.; House Report No. 71, 80th Cong., 1st Sess.; Senate Report No. 48, 80th Cong., 1st Sess.

While, as hereinbefore observed, the decisions sustaining the validity of the Portal-to-Portal Act are almost too numerous to mention, it appears appropriate to observe that the constitutionality of the Act, or sections thereof, has been considered, and in each instance upheld, in the following decisions of United States Courts of Appeals:

Rogers Cartage Co. v. Reynolds, 6th Cir., 166 F. 2d 317;

Sesse v. Bethlehem Steel Co., 4th Cir., 168 F. 2d 58;
Atallah v. Hubbert & Sons Inc., 4th Cir., 168 F. 2d 993, cert. den., sub nom. *Cingrigrani v. Hubbert & Son,* Nov. 25, 1948, ... U.S. ....., 93 L. Ed. Adv. Op. 92;

Battaglia v. General Motors Corp., 2nd Cir., 169 F. 2d 254, cert. den. Dec. 6, 1948, ... U.S. ....., 93 L. Ed. Adv. Op. 126;

Darr v. Mutual Life Ins. Co., 2nd Cir., 169 F. 2d 262, cert. den. Nov. 22, 1948, ... U.S. ....., 93 L. Ed. Adv. Op. 94;

Fisch v. General Motors Corp., 6th Cir., 169 F. 2d 266, cert. den. Jan. 3, 1949, ... U.S. .....;

Lasater v. Hercules Powder Co., 6th Cir., ... F. (2d) ....., 15 Labor Cases ¶ 64, 857, Dec. 6, 1948;

Potter et al v. Kaiser Co., Inc., 9th Cir., ... F. (2d) ....., Jan. 10, 1949.

Decisions of United States District Courts wherein Sections 9 or 11 of the Act, or both, have been specifically considered, and in each case upheld, are listed in the margin.*

For the Court's convenience, those portions of the several decisions of United States Courts of Appeals dealing particularly with Sections 9 and 11 of the Portal-to-Portal Act are here quoted *in extenso*.

In *Rogers Cartage Co. v. Reynolds*, 6th Cir., 166 F. 2d 317, at pp. 320, 321, Judge Allen spoke for the court as follows:

> "Sections 9 and 11 of the Portal-to-Portal Act are constitutional. Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights. *North American Co. v. Securities & Exchange Commission*, 327 U.S. 686, 708, 66 S. Ct. 785, 90 L. Ed. 945; *American Power & Light Co. v. Securities & Exchange Commission*, 329 U.S. 90, 67 S. Ct. 133. While the rights given to employees under the Fair Labor Standards Act are substantial, they did not exist at common law, nor were they established by the United States Constitution. Since they are purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment. Cf. *Western Union Telegraph Co. v. Louisville & Nashville Rd. Co.*, 258

**Darr v. Mutual Life Insurance Co.* (D.C. S.D. N.Y.), 72 F. Supp. 752, aff'd 169 F. 2d 262, cert. den. ..... U.S. ....., 93 L. Ed. Adv. Op. 94; *Lasater v. Hercules Powder Co.* (D.C., E.D. Tenn.) 73 F. Supp. 264, aff'd ..... F. 2d ....., 15 Labor Cases ¶ 64, 857; *Reid v. Day & Zimmerman* (D.C., S.D., Ia.) 73 F. Supp. 892, aff'd 168 F. 2d 356; *Kam Koon Wan v. E. E. Black Ltd.*, (D.C. Hawaii) 75 F. Supp. 553; *Jackson v. Northwest Airlines* (D.C. Minn.) 76 F. Supp. 121; *Blessing v. Hawaiian Dredging Co.* (D.C. Dist. of Col.) 76 F. Supp. 556; *Ferrer v. Waterman S.S. Corp.* (D.C. Puerto Rico) 76 F. Supp. 601; *Asselta v. 149 Madison Ave. Corp.* (D.C., S.D. N.Y.) 79 F. Supp. 413; *Burke v. Mesta Machine Co.* (D.C. W.D. Penn.) 79 F. Supp. 588; *Wood v. Guy F. Atkinson Co.* (D.C. W.D. Wash.), (Feb. 18, 1948), 14 Labor Cases ¶ 64, 466; *Hoffman v. Todd & Brown, Inc.* (D.C. N.D. Ind., Oct. 25, 1948), 15 Labor Cases ¶ 64, 856.

U.S. 13, 42 S. Ct. 258, 66 L. Ed. 437; *Kline v. Burke Const. Co.,* 260 U.S. 226, 234, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1077. The constitutionality of the Act has been recently considered in various District Courts, and invariably upheld. Cf. *Boehle v. Electro Metallurgical Co.,* D. C., 72 F. Supp. 21."

In *Darr v. Mutual Life Insurance Co.,* 169 F. 2d 262, certiorari denied, Nov. 22, 1948, ... U.S. ....., 93 L. Ed. Adv. Op. 94, the Court of Appeals for the Second Circuit spoke through Judge Chase, 169 F. 2d at p. 266, as follows:

"We need now make no distinction between section 9, which bars the claim, and section 11, which allows the elimination of liquidated damages in the discretion of the court, for if one is valid the other is also. Both were passed by Congress as a part of an act to regulate interstate commerce, a subject exclusively within the legislative power of the national government. The Portal-to-Portal Act followed Congressional investigation and findings of facts concerning the effect upon commerce of the Fair Labor Standards Act, as that statute had been construed by the Supreme Court, as shown in our opinion in *Battaglia et al. v. General Motors Corporation,* 169 F. 2d 254. We there discussed the constitutionality of the statute with especial reference to the then applicable section 2, and held that it was valid notwithstanding the fact that it obliterated causes of action for overtime pay, liquidated damages, and counsel fees, which had accrued under the Fair Labor Standards Act previous to the enactment of the Portal-to-Portal Act. The reasons which induced us to reach that conclusion in the General Motors case are pertinent here, for all three sections are but an exercise of the same power, differing only in method of application, and we refer to our opinion in that case without repetition. We hold, therefore, as did the Sixth Circuit in *Rogers Cartage Co. v. Reynolds,* 166 F. 2d 317, that, even if appellants' rights are considered as contractual, these two sections are a valid exercise of the constitutional power of Congress to legislate in the field of interstate commerce and that

section 9 bars recovery on this claim while section 11 was properly, though—in view of the effect of section 9 —unnecessarily, applied to defeat recovery of liquidated damages."

It may be noted that both the above-quoted cases involved overtime work actually performed and not "portal-to-portal" activities.

Section 9 of the Act has again recently been upheld in *Lasater v. Hercules Powder Co.*, 6th Cir., ... F. 2d ....., 15 Labor Cases ¶ 64, 857, Dec. 6, 1948, upon the authority of *Rogers Cartage Co. v. Reynolds, supra,* and *Darr v. Mutual Life Insurance Co., supra.*

Without known exception, the Federal courts presented with the question have declared Sections 9 and 11 of the Portal-to-Portal Act to be constitutional, and Appellants have failed to sustain the burden of establishing that a contrary result should for the first time follow here.

II.

Appellees Are Relieved of Any Liability Under Section 9 of the Portal-to-Portal Act of 1947.

A. The Statute Involved.

For convenient reference §§ 9 and 11 of the Portal-to-Portal Act of 1947 are set forth in full in Appendix A, infra.

Analysis of § 9 reveals that these employers shall be subject to no liability for or on account of the failure to pay overtime compensation under the Fair Labor Standards Act if they plead and prove that this failure was

(1) "in good faith in conformity with"

(2) "and in reliance on"

(3) "*any* administrative regulation, order, ruling, approval or interpretation, of"

(4) "*any* agency of the United States"

The trial court in its informal memorandum opinion indicated that "the evidence overwhelmingly convinces the court" and that "the contracting employers of plaintiffs amply demonstrated on every hand" that this burden had been sustained.

B. The War Department, The Corps of Engineers and The War Department Wage Administration Agency Are "Agencies of the United States."

From the Statement of the Case set forth above it appears that those documents and communications brought to the attention of the Appellees and upon which the trial court found they relied in good faith were actions of (a) The War Department, (b) The Corps of Engineers of the War Department, and (c) The Wage Administration Agency.

We do not propose to burden this Court with a dissertation to establish that the War Department is an agency of the United States. With reference to the Corps of Engineers, this agency was created by Act of Congress (10 U.S.C.A. § 181) and was "charged with the direction of all work pertaining to construction, maintenance and repair of buildings, structures and utilities for the Army." 10 U.S.C.A. § 181 b.

The War Department Wage Administration Agency is also an "agency of the United States". Pursuant to General Order No. 14 of the National War Labor Board, dated November 26, 1942 (29 C.F.R. Cum. Supp. § 803.14; 7 F.R. 9861; for amendments not here material see 29 C.F.R. 1943 Supp. § 803.14 and 29 C.F.R. 1945 Supp. § 803.14) it was provided:

> "(a) The National War Labor Board hereby delegates to the Secretary of War, to be exercised on his behalf by the Wage Administration Section within the Civilian Personnel Division, Headquarters, Services of

> Supply (hereinafter referred to as the 'War Department Agency') the power to rule upon all applications for wage and salary adjustments (insofar as approval thereof has been made a function of the National War Labor Board) covering civilian employees within the continental limits of the United States and Alaska employed by * * * (3) government owned, privately operated facilities of the War Department.
>
> "* * *.
>
> "(h) The term 'government-owned privately-operated facilities of the War Department' shall include for the purposes of this order only those facilities (1) in which the War Department has contractual responsibility for the approval of pay roll costs * * *."

By letter dated December 24, 1942 the Commissioner of Internal Revenue delegated to the Secretary of War as agent of the Commissioner in substantially identical language the authority to rule upon such applications for salary adjustment whose approval had been made a function of the Commissioner (10 C.F.R. Cum. Supp. § 81.977 aaa).

It has been held that the War Department (*Kam Koon Wan v. E. E. Black, Ltd.*, D. C. Hawaii, 75 F. Supp. 553) and the Ordnance Department (see *Reid v. Day & Zimmerman*, D.C. S.D. Iowa, 73 F. Supp. 892, aff'd. 168 F. (2d) 356) as well as the Corps of Engineers are agencies of the United States under the Portal-to-Portal Act of 1947 (*Curtis v. McWilliams Dredging Co.*, 119 N.Y.L.J. 744, 78 N.Y.S. (2d) 317). Similarly the Bureau of Yards and Docks of the Navy has been determined to be an "agency of the United States" (*Kenney v. Wigton-Abbott Corp.*, D.C. N.J., 80 F. Supp. 489, 496; see also *Blessing v. Hawaiian Dredging Co.*, D.C. D. Col., 76 F. Supp. 556). Also the Salary Stabilization Unit of the Treasury Department (*Wells v. Radio Corporation of America*, D.C. S. D. N. Y., 77 F. Supp. 964, 967) as well as the National War Labor Board and the Maritime

Commission (*Brueschke v. Joshua Hendy Corp.*, D.C. S.D. Calif., 14 Labor Cases ¶ 64, 266) has been held to be an "agency of the United States" within § 9 of this Act.

We do not understand that Appellants deny that the War Department, the Corps of Engineers and the Wage Administration Agency are agencies of the United States within § 9 of the Portal-to-Portal Act.

C. The Documents and Communications Relied Upon by the Appellees Were Duly Authorized Acts of These Three Agencies.

The regulations, orders, rulings, approvals, or interpretations within the purview of § 9 of the Portal-to-Portal Act of 1947 obviously refer to the actions of the agency in question and cannot simply be unauthorized or irresponsible statements from individuals "connected with" the agency. See *O'Riordan v. Helmers,* 120 N.Y.L.J. 110, 15 Labor Cases ¶ 64,657. An agency of the United States speaks only through its representatives and obviously its acts must emanate from those persons "specifically delegated to do so," (*Burke v. Mesta Machine Co.,* D.C.W.D. Pa., 79 F. Supp. 588), or those for whom such authority must be implied under the circumstances. *Kam Koon Wan v. E. E. Black Ltd.*, D. C. Hawaii, 75 F. Supp. 553 at 562-563. The unauthorized or gratuitous expressions of employees of an agency are not within the contemplation of § 9. For example, expressions of inspectors of the Wage & Hour Division of the Department of Labor upon questions as to applicability of the Fair Labor Standards Act have repeatedly been held not to be the acts of an agency of the United States under § 9 since such inspectors have not been given the authority to speak for the agency on such matters. *Burke v. Mesta Machine Co.,* supra; *Bauler v. Pressed Steel Car Co.*, D.C.

N.D. Ill., 15 Labor Cases ¶ 64,751; *Central Missouri Telephone Co. v. Conwell* 8th Cir., 170 F.(2d) 641.

No such problem of unauthorized pronouncements, however, arises in the cases now before this Court. Each and all of the documents and communications received by the Appellees emanated from one of the three agencies here involved—the War Department, the Corps of Engineers, and the Wage Administration Agency—as *its* action.

From the start to the finish of the construction projects upon which Appellees were engaged, these three agencies adopted and adhered to a uniform and unwavering policy with respect to the payment of overtime compensation to Class B and C non-manual employees. Throughout the course of these construction projects, communications and documents were sent to Appellees directing and instructing them to follow that policy.

In each and every instance the individual giving the communication or signing the document was specifically authorized to do so. The authority of these individuals is clearly set forth in the documentary record before the court. Because each of the individuals involved was acting pursuant to specific authority, there can be no question but that each and all of the documents and communications were the acts of an "agency of the United States".

Appellants imply that Appellees are urging that each contracting officer or other person signatory to the communications relied upon by Appellees is an "agency of the nited States" (Appellants' Brief, No. 11983, p. 43). No such contention is made. What is contended is that each of these communications was promulgated or issued by persons who not only had apparent authority to so act (compare *Kam Koon Wan v. E. E. Black, Ltd.*, D. C. Hawaii, 75 F. Supp. 553 at 562-563) but who in fact were duly delegated and

authorized so to act to the knowledge of the Appellees. Within the scope of their authority from which none departed, the acts of these individuals were either the acts of the Corps of Engineers, the War Department, or the Wage Administration Agency as the case may be.

1. The Corps of Engineers.

The basic labor policies governing the military construction undertaken by the Appellees were grounded in the labor policies established by the Corps of Engineers pursuant to its statutory authority. As set forth above the Corps of Engineers was created by Act of Congress (10 U.S.C.A. § 181) and was "charged with the direction of all work pertaining to the construction, maintenance and repair of buildings, structures and utilities for the Army". 10 U.S.C.A. § 181 b. In Army Regulations No. 100-70 dated November 5, 1942 (Ex. 12) the Authority and Responsibility of the Chief of Engineers is stated to include:

> "11. Labor Relations. — As the maintenance of proper relations between management, labor and Government is essential to the efficient and expeditious conduct of construction work, the Chief of Engineers will maintain the necessary organization *to insure that proper labor relations are established and maintained, that labor laws are correctly administered and that proper wage rate structures* and an adequate labor supply are maintained on all new work under his jurisdiction."

Pursuant to such authority Circular Letters 2236 and 2390 (Exs. 14 and 15) were issued by the Chief of Engineers.

Whether or not the Corps of Engineers itself be considered to be an agency of the United States within the meaning of § 9, it is clear that its actions are by law those of the War Department. As stated in *Blessing v. Hawaiian*

Dredging Co., Ltd., D.C.D. Col., 76 F. Supp. 556, 557 with reference to the Bureau of Yards and Docks of the Navy

> "It cannot be gainsaid that the Chief of the Bureau of Yards and Docks speaks for the Secretary of the Navy, when functioning in this capacity."

Pursuant to the provisions of 10 U.S.C.A. § 181b, General Marshall as Chief of Staff, transferred by War Department Circular No. 248, dated December 4, 1941 to the Corps of Engineers all construction activities then handled by the Quartermaster Corps (Ex. 10). Under Executive Order No. 9082 (3 C.F.R. Cum. Supp. page 1103) the President authorized the Secretary of War to place into effect a reorganization of the War Department. This was done in War Department Circular No. 59 dated March 2, 1942 (Ex. 11) which set up the Corps of Engineers as one of the Units assigned to the Services of Supply (See ¶ 8(b) and 7(e) (2)). Army Regulations No. 100-70 discussed above (Ex. 12) outlining the Authority and Responsibility of the Corps of Engineers, were promulgated pursuant to these foregoing authorities. Accordingly the actions, documents and communications of the Corps of Engineers and the labor policies established thereby are also the duly authorized actions and policies of the War Department.

2. The War Department.

Appellants have not contested the authority of those various individuals acting as the War Department. However, as a convenience to the Court, an analysis of the numerous documentary exhibits relating to the authority of these individuals is set forth in Appendix C, infra.

It is abundantly clear that each individual signing or issuing the documents and communications received by the Appellees was specifically authorized and delegated to do so and that his actions were in fact within the scope of

his authority and the authority of the Corps of Engineers and the War Department relating to such matters.

3. The Wage Administration Agency.

As set forth above (supra, p. 27) the War Department Wage Administration Agency is an "agency of the United States". The so-called Abersold Directive (Ex. 16) was the act of this agency and recites:

> "Attention is invited to the fact that the War Department Wage Administration Agency has been granted specific authority, by agreement between the National War Labor Board and the 12th Regional War Labor Board to take jurisdiction over the request of the Alaskan Department and the Northwest Service Command for approval of the schedule and policies referred to in paragraph 3 above."

D. The Documents and Communications Received by Appellees Were Administrative Regulations, Orders, Rulings, Approvals and Interpretations.

Under § 9 of the Portal-to-Portal Act these Appellees shall not be subject to any liability for failure to pay overtime compensation under the Fair Labor Standards Act if they have pleaded and proved that such failure was in good faith in conformity with and in reliance on "any administrative regulation, order, ruling, approval or interpretation" of any agency of the United States. That Congress intended these words to have a liberal interpretation is well set forth in the following language from the well-reasoned opinion in *Kam Koon Wan v. E. E. Black, Ltd.*, supra, at pp. 562-563:

> "In Representative Walter's statement upon the bill addressed to this type of problem is found the following: '* * * there must have been literally thousands of instructions sent out by the Army, the Navy and the Maritime Commission and other government

officials to employers having government contracts during the war that were never issued or confirmed in the usual way, but the employer felt that the person giving those instructions was in a position to speak with authority and in those classes of cases we hope this measure will provide a defense.'

"In view of the congressional findings and declared objective of the Portal-to-Portal Act, the liberal intepretation which Congress intended to place upon the phrase 'agency of the United States' so far as § 9 is concerned and the Act's legislative history, I am satisfied that the military orders here involved come within the meaning of the statutory words 'regulation, order, ruling, approval or interpretation' and were orders of an 'agency of the United States'. I reach this conclusion being fully aware that it was not the normal function of the Army to concern itself directly with the Fair Labor Standards Act and to make orders, rulings and interpretations of it to suit iteslf. * * *"

And it may be noted in passing that the above quoted statement from Representative Walter immediately follows that portion of his statement which was quoted by Appellants (Appellants' Brief, Nos. 11984 and 11985, p. 39) but was conveniently omitted from their brief.

Counsel for Appellants suggest that the Administrator has narrowly interpreted these words (Appellants' Brief, Nos. 11984 and 11985, pp. 27-30). While the Administrator's opinions may be entitled to some weight, *Skidmore v. Swift & Co.*, 323 U.S. 134, it may be remembered that perhaps "this statement, being legally untenable lacks the usual respect to be accorded the Administrator's rulings, interpretations and opinions". *Jewell Ridge Coal Corp. v. Local No.* 6167, U.M.W., 325 U.S. 161, 169.

The legislative history of § 9 demonstrates that "in brief Congress desired to make this defense available to employers who honestly had been misled by their own governmnt

speaking through one of its authorized spokesmen to pursue a course of action which ultimately is found to be at variance with the laws." (*Kam Koon Wan v. E. E. Black, Ltd.*, supra, at page 561.) The fact that Congress embraced in § 9 oral as well as written actions of the agency (cf. § 10, Title 29 U.S.C.A. § 259) is eloquent testimony that the form in which that action was expressed was of little concern in the consideration of the Act by Congress. The all inclusive nature of the wording of the statute "any administrative regulation, order, ruling, approval or interpretation" is proof itself of the soundness of the views expressed above in the Kam Koon Wan case, supra.

Likewise do we believe that the decided cases clearly demonstrate that the documents and communications here in evidence come within the statutory language of § 9 quoted above.

In *Curtis v. McWilliams Dredging Co.*, 78 N.Y.S. (2d) 317 the Court had for consideration a situation where the defendants had been involved in construction work in Greenland comparable to that of these Appellees. Although the Court considered §§ 9 and 11 of the Portal-to-Portal Act of 1947 to be unconstitutional, it found no difficulty in holding that the contractors were within § 9 in their reliance upon Circular Letters 2236 and 2390 (here Exs. 14 and 15) and other documents and communications substantially identical in character to those received by these Appellees—and even though the defendants themselves had advised the War Department that they understood that the Administrator was of the opinion that the Fair Labor Standard Act applied to their operations. The Court states regarding the defense asserted under § 9:

> "The defense calls for a review of the orders, rulings and correspondence of the War Department.

"The contract between the War Department and the defendants was entered into August 27, 1941. It provided, among many other details, for reimbursement to the defendants of all payroll expenditures. Circular letter of the department (Finance No. 167) of June 20, 1941, was then in effect; it prescribed the auditing procedure on cost-plus contracts and although it dealt with salaries and payrolls it did not mention overtime. On August 9, 1941, a supplement was issued (Finance No. 167, Supplement No. 2) as follows: 'The payment of overtime to cost-plus-a-fixed-fee contractors' weekly salaried employees is not justified by normal practice and is not permissible.' On August 21, 1941, the Office of Division of Engineers, North Atlantic Division, wrote the defendants that 'no overtime will be allowed to employees paid at a weekly rate of pay' (all three plaintiffs here were paid on a weekly basis); but compensatory time will be allowed' them 'for all time worked in excess of 40 hours a week.' Later, October 24, 1941, the provision for 'compensatory time' was rescinded. Thereupon the defendants wrote for instructions in a letter prepared for them by their attorneys. They stated

> "'* * * we draw to your attention that in recent months the United States Department of Labor, Wage & Hour Division, under whose jurisdiction comes the administration of the Fair Labor Standards Act, * * * has issued interpretive bulletins bearing upon overtime in the contracting industry. We are advised that such interpretive bulletins very clearly state that in the opinion of the Wage and Hour Division, many of our personnel who from time to time work overtime are covered by the provisions of the Federal Wage and Hour Law. If that is so, such of our personnel so covered would be entitled to time-and-a-half for overtime.'

"The response, November 7, 1941, was as follows:

> "'You are advised that no compensation will be allowed for such overtime work either in the form of

an equal amount of time off with pay or in the form of extra pay for extra hours of duty.'

"Upon the receipt of this letter a member of the firm of attorneys representing these defendants and other contractors engaged in similar work for the War Department discussed the matter with the representative of the War Department who had prepared the letter of November 7; and he was told that it was the considered opinion of the War Department that the Fair Labor Standards Act did not apply to employees of these contractors, including defendants; that it was the policy of the War Department to act upon that view and that the contractors would receive no reimbursement from the government for any overtime they might pay pursuant to the provisions of that act."

Concerning Circular Letter 2236 and 2390 the Judge observed:

"* * * Again these provisions did not follow the provisions of the Fair Labor Standards Act; in promulgating it the War Department considered Executive Order 9301 (February 19, 1943) already referred to, and also the act. It believed that Circular Letter 2390 complied with the Presidential proclamation; and that the Fair Labor Standards Act did not apply."

and concludes his well-reasoned opinion on this point as follows:

"* * *. But it does not appear that the Secretary of War at any time recognized the applicability of the statute to employees like the plaintiffs here and as late as April 7, 1943, it was 'the understanding of the War Department that non-manual employees of these contractors (cost-plus-a-fixed-fee contracts) were not entitled to receive time-and-one-half for overtime under the provisions of the Fair Labor Standards Act * * *'."

* * *

> "So far as the defendants are concerned their negotiations and dealings were entirely with the War Department. Employees could be hired by them only after approval by the Corps of Engineers and the salary and wage scale was that approved by the Corps of Engineers. In no event could the defendants be reimbursed by the Government for any wages disbursed unless those payments were in strict accord with the instructions and rulings from the Department. If we examine the relations of the defendants to the War Department, we find that although there were doubts in the minds of the defendants as to the applicability of the statute, they were told that overtime would not be allowed under the Fair Labor Standards Act, and the very regulations and orders issued from time to time consistently bear out these instructions. Quite apart from the question as to whether there was any policy of the War Department with relation to cost-plus contractors, it is plain that there were orders and rulings relating to the payment of wages directed to the defendants and that the defendants complied with those rulings."

It is also indicated in *Leeds v. Sawyer,* 118 N.Y.L.J. 261, 13 Labor Cases ¶ 63972, judgment vacated on other grounds, 118 N.Y.L.J. 445, 13 Labor Cases ¶ 64,032, that Circular Letters 2236 and 2390 are within § 9. Not only have military orders been held to be within the purview of this statute, *Kam Koon Wan v. E. E. Black, Ltd.,* supra, but also "circular letters" of instructions from the office of the Officer in Charge, Bureau of Yards and Docks of the Navy. *Kenney v. Wigton-Abbott Corp.,* D.C.N.J., 80 F. Supp. 489, 496. Likewise within § 9 have been held rulings of the National War Labor Board, Shipbuilding Commission and approvals of the Maritime Commission (*E. H. Brueschke v. Joshua Hendy Corp.,* D.C.S.D. Calif., 14 Labor Cases ¶ 64,-266), War Labor Board directives (*Rogers Cartage Co. v. Reynolds,* 6th Cir., 166 F. (2d) 317 at 320), and approvals of the Salary Stabilization Unit of the Treasury Department

(*Wells v. Radio Corporation of America,* D.C.S.D.N.Y., 77 F. Supp. 964, 967)—the character of all of which are identical with the rulings of the Wage Administration Agency here in evidence (Ex. 16).

Finally there should be called to the attention of this Court, in addition to the decision of the court below upon this record, the conclusions of the Hon. Lloyd L. Black of the same court below in *Wood et al. v. Guy F. Atkinson Co., et al.,* D.C.W.D. Wash., 14 Labor Cases ¶ 64,466 which, as to these matters arising under § 9 of the Portal-to-Portal Act of 1947, were rendered upon substantially the identical record which is before this Court, the exhibits in both cases being identical and the testimony being substantially the same by substantially the same witnesses. Judge Black stated in his informal opinion:

> "I may say further, counsel, that in the light of all the evidence and of the law I am satisfied that each and every cause of action submitted to me should be dismissed under Section 9. Certainly, if Section 9 had not been passed and Section 11 had, I would be required to hold that the defendants had acted in good faith as required by the provisions of Section 11. However, I am satisfied that the defendants have established by the preponderance of the evidence the things requisite for them to establish under Section 9."

The decided cases well illustrate that the documents and communications received and relied upon by these Appellees were *"administrative regulations, orders, rulings, approvals and interpretations"* under § 9. They effectuate, we submit, the intent of Congress as set forth by Representative Walter, sponsor of the bill in the House of Representatives and member of the Conference Committee, when reporting to the House on the Conference Committee Report accompanying the final draft of the bill as follows:

"Mr. Speaker, I do not believe any conference report—at least, there have not been many presented to this House for consideration—has received the care that was given this legislation. * * *

* * *

"* * * Of course, during the war there were a great many rulings made by people who were not connected with the Wage and Hour Division, but certainly during those trying times when a contractor was endeavoring to follow out the instructions of his Government, if he received instructions from somebody in a position of authority, then if those instructions resulted in his violating the law that man should have a defense. * * *" (Vol. 93 Congressional Record, May 1st, 1947, p. 4389).

Analysis of Contentions of Appellants

It is urged by Appellants that the documents and communications on which the trial court found the Appellees relied are not "administrative regulations, orders, rulings, approvals and interpretations of any agency of the United States" because (a) by their terms they did not relate to or purport to pass upon the applicability of the Fair Labor Standards Act (Appellants' Brief, No. 11983, p. 44; Appellants' Brief, Nos. 11984 and 11985, pp. 34-35) or (b) because the Appellees had a contract with the agency involved (Appellants' Brief, No. 11983, p. 44; Appellants' Brief, Nos. 11984 and 11985, pp. 31-33.)

(a) Reference to the Fair Labor Standards Act.

Considering these contentions in this order, we believe that the first may be adequately answered by reference to § 9 itself which refers to *"any"* administrative regulation, order, etc. We also direct the Court's attention to the fundamental difference established by Congress between § 9 and § 10, which latter section relates to reliance in the

case of acts of ommissions *after* the date of the Portal-to-Portal Act. Congress significantly required that future reliance be only upon the actions of the Administrator of the Wage and Hour Division—in short, actions which relate to and purport to pass upon the applicability of the Fair Labor Standards Act. We think it apparent that Congress knew, as does this Court, that the Administrator is the only agency of the United States which customarily issues or has issued administrative regulations, orders, rulings, etc. which by their terms refer to the Fair Labor Standards Act itself. Our attention has not been called to any instance where any other agency than the Administrator has purported to issue regulations, orders, etc. which relate as such to the Fair Labor Standards Act. Indeed, the Act entrusts such function by its own terms to the Administrator.

To add to § 9 the requirement that the regulations, orders, etc. relied upon shall relate to the Fair Labor Standards Act is to add a requirement not placed there by Congress and to change the substance of § 9 to that of § 10. The entire legislative history negatives any suggestion that the documents and communications relied upon by Appellees should relate or refer to the Fair Labor Standards Act. See, for example, remarks of Representative Walter quoted at p. 40 supra. And rather than labor the point, we simply refer the Court to the decided cases cited above in not one of which, we desire to point out, did the administrative regulation, order, ruling, etc., relied upon by the employer relate to or purport to pass upon the applicability of the Fair Labor Standards Act. See *Kenney v. Wigton-Abbott Corp.*, supra; *E. H. Brueschke v. Joshua Hendy Corp.*, supra; *Rogers Cartage Co. v. Reynolds,* supra; *Wells v. Radio Corporation of America,* supra; see also *Blessing v. Hawaiian Dredging Co.*, supra, and *Kam Koon Wan v. E. E. Black, Ltd.*, supra.

Furthermore, even if a consideration of the Fair Labor

Standards Act by the agency involved be deemed a condition precedent to the qualification of any regulation, order, etc., under § 9 it is plainly apparent from the record here on appeal that the Fair Labor Standards Act was considered by the Corps of Engineers and the War Department—considered to be inapplicable. See, for example, Exs. 14, 15, 58, 59, 63, 75. See also *Curtis v. McWilliams Dredging Co.*, 78 N.Y.S. (2d) 317, supra, p 35.

(b) Contracting Agency.

As indicated above Appellants urge that Appellees should be denied relief under § 9 for the reason that the regulations, orders, rulings, etc., relied upon were issued by an agency to whom the Appellees were under contract.

Preliminarily it may be observed that the contracts of Appellees (Ex. 13) were between Appellees and the United States of America rather than an agency upon whose actions Appellees relied, and even if it be deemed that Appellees' contracts were with an agency, that agency could only be considered to be the War Department and not the Corps of Engineers or the Wage Administration Agency, which agencies as noted above, derived their authority from sources outside the War Department. Accordingly even if Appellants' proposition could be accepted as valid, §9 and the findings of the trial court still stand as a necessary bar to any recovery by the Appellants.

The entire legislative history of § 9, however, as indicated by the quotations above at pages 33 and 40 categorically demonstrates that Congress intended to relieve from liability those contractors who in good faith had relied on the regulations, orders, etc. of their contracting agency.

That the regulations, orders, rulings, etc. of a contracting agency are covered by § 9 is expressly recognized by the Administrator in his "General Statement as to the Effect

of the Portal-to-Portal Act of 1947". See Title 29 C.F.R., 1947 Supp., §§ 790.13(b) and 790.14(c). We further refer to the decided cases cited above which have specifically held that the regulations, orders, etc. of a contracting agency which have been relied upon by its contractor fall within § 9. *Kam Koon Wan v. E. E. Black, Ltd.,* supra; *Curtis v. McWilliams Dredging Co.,* supra; *Kenney v. Wigton-Abbott Corporation,* supra; *Blessing v. Hawaiian Dredging Co.,* supra; *E. H. Brueschke v. Joshua Hendy Corp.,* supra; *Leeds v. Sawyer,* supra; compare also *Reid v. Day & Zimmerman,* supra; *O'Riordan v. Helmers,* supra; and *Divins v. Hazeltime Electronics Corp.,* D.C.S.D.N.Y., 13 Labor Cases ¶ 64,213.

Appellants contend that *Jackson v. Northwest Airlines, Inc.* D.C.D. Minn., 76 F. Supp. 121 dictates a contrary conclusion. Although the opinion of the District Court in that case, which is presently on appeal to the Court of Appeals for the Eighth Circuit, has been criticized as unduly restrictive of the scope of § 9 (see Note — "Portal-to-Portal—Good Faith Provisions" 48 Columbia Law Review 443 at 447) we think an analysis of the facts before the trial court does not require the conclusion that the court construed § 9 to exclude the regulations, etc., of a contracting agency. The record before the court contained no evidence whatsoever of any policy or ruling of the Army Air Force or any evidence of the authority of the contracting officer to make such. On the other hand the facts plainly revealed that the contracting officer in question twice altered his position as to the applicability of the Fair Labor Standards Act to defendant's employees to suit the convenience of the defendant who, the court found as a matter of fact, relied upon a ruling by the Chairman of the Railway Labor Panel which by law he was not authorized to give.

We submit that the *Jackson* decision is not contrary to the overwhelming authority of the decided cases and to

the extent that the language in the opinion implied that the regulations, orders, etc. of a contracting agency are not within § 9, its implications are unsound.

As indicated by the records in these cases before the Court, the responsibilities and obligations of these Appellees in the performance of their military construction work for the government were subject to constant modification and change as a result of a continuous body of instructions from numerous duly authorized contracting officers. To suggest a rule of law which would militate against an employer because he had a contract with the United States which told him to follow such instructions in favor of an employer who merely followed the instructions because he was told to do so by the terms of those regulations or orders is, we submit, to suggest the difference between tweedle-dum and tweedle-dee. In the words of Judge Learned Hand in *Cabell v. Markham,* 2nd Cir., 148 F. (2d) 737 at 739, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." We believe this Court must agree that Congress had few situations more clearly in mind than that presented by this record in the enactment of § 9.

E. The Practices of Appellees Were in Conformity with Administrative Regulations, etc., of an Agency of the United States.

The trial judge specifically found in each of these cases that the pay practices of Appellees were in good faith *in conformity with* administrative regulations, orders, rulings, approvals and interpretations of the United States War Department, the Corps of Engineers, and the Wage Admin-

istration Agency. The evidence clearly and without dispute supports the finding that Appellees conformed their pay policies to the instructions and documents received from those three agencies (R. 183-5; 398-9; 469).

The question of conformity has not been raised by Appellants in their briefs, and in fact appears to have been conceded (Appellants' Brief, Nos. 11984, 11985, pp. 33-34). Indeed, such conformity was affirmatively pleaded in the complaints filed herein by Appellants and forms the basis for these suits against Appellees.

F. The Practices of Appellees Were in Good Faith in Reliance on Administrative Regulations, etc., of an Agency of the United States.

At the outset, Appellees point to the fact that the trial court in each of these cases specifically found that all pay practices of Appellees with respect to Appellants or Appellants' assignors were ". . . in good faith . . . and in reliance on administrative regulations, orders, rulings, approvals and interpretations of . . . The United States War Department, The Corps of Engineers of the United States War Department and The War Department Wage Administration Agency." (No. 12017, R. 11) (No. 11983, R. 16) (Nos. 11984 and 11985, R. 18) (No. 12018, R. 54, 55).

Whether or not the Appellees acted in good faith is a question of fact to be determined on the evidence. See *Beaton v. Berberich,* App. D.C., 135 F. (2d) 831. Whether or not Appellees did rely upon the communications and documents received from the three agencies here involved is likewise a question of fact. The trial judge found in favor of Appellees on both of these questions, and indicated in his memorandum opinion that the evidence "overwhelmingly" convinced him and "demonstrated amply on every hand" that his findings were correct on these questions. (Trial Court's Memorandum Opinion, p. 6).

Under the mandate of Rule 52a of the Federal Rules of Civil Procedure findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Appellants have predicated their entire argument upon the premise that since Appellees' overtime pay practices were consistent with the provisions of their contracts, they could not have relied upon anything other than the contracts. This is fallacious reasoning and contrary to the record.

Accurately stated, the record discloses that Appellees sought and relied upon the regulations, orders, rulings, approvals and interpretations of The War Department, The Corps of Engineers and The War Department Wage Administration Agency, which confirmed in every respect the contract provisions with respect to overtime.

The principal contracts involved in these appeals were executed September 30, 1943 (Contract No. 202) and December 31, 1943 (Contracts 500, 501 and 502). While Circular Letter No. 2236 (Ex. 14) and Circular Letter No. 2390 (Ex. 15) were dated prior to the execution of the contracts, the Appellees were advised at the time of and *subsequent* to the date of the contracts that they would be expected to comply with the provisions of the Circular Letters. (Ex. 33; R. 83-91, 111-112). Exhibits 29 to 67, inclusive, were all either sent or received and are dated subsequent to the effective dates of the contracts mentioned.

If it be true, as Appellants contend, that Appellees did nothing more than rely upon their contracts, with respect to overtime pay procedures, why did Appellees, among other things:

1. On December 23, 1943 write the Contracting Officer, inquiring

"Is the payment of premium rates for work in excess of forty hours per week mandatory under Contract No. W-45-108-eng-202?" (Ex. 74)

2. Address inquiries to the Contracting Officer in January of 1944 which resulted in their being informed under date of February 12, 1944:

"Overtime pay shall be in accordance with the Chief of Engineer's Circular Letter 2390, a copy of which has already been furnished to you." (Ex. 33)

and under date of February 13, 1944:

"It will be necessary for your non-manual employees to work any reasonable number of hours per day during the first six days of a week to fulfill their functions. However, no overtime benefits shall accrue on the first six days." (Ex. 34)

3. On March 18, 1944 write the Resident Engineer in Alaska, inquiring

"In the interest of economy and general efficiency on the job, it is our opinion that members of non-manual employees in Group (B) be required to work ten hours per day to conform to the hours of work of manual employees over whom the non-manual employees are exercising checking supervision. For the additional two hours per day we believe the non-manual employees are entitled to overtime payment in conformity with the provisions of the Job Contract and Executive Order No. 9240.

Your favorable consideration is earnestly solicited." (Ex. 39)

4. Join in the preparation and submission of their payroll and overtime procedures to the War Department Wage Administration Agency which resulted in the Abersold Directive (Ex. 16).

These acts are not consistent with a blind reliance upon the Contract provisions, as Appellants contend.

It is impossible to read the Transcript of Record in these cases, or even the Statement of the Case as heretofore set forth, and conclude otherwise than, as did the trial court, that Appellees' overtime pay policies "were in good faith, in conformity with and in reliance on Administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to wit:The United States War Department, The Corps of Engineers of the United States War Department, and The War Department Wage Administration Agency."

Appellees concede that " no document or oral instructions ever caused (them) to deviate one iota from the terms of the prime contract", as appellants contend. (Appellants' Brief, Nos. 11984 and 11985, p. 33). This is not to say, however, that Appellees did not rely upon the many orders, rulings, approvals and interpretations, subsequent to the contract. By Exhibits 16, 33, 34, 40, 55, 75, and many others, Appellees were repeatedly told and advised that there was no legal basis or authority for the payment of overtime contrary to the provisions of the contracts. The expressions as contained in the exhibits have been quoted heretofore in this brief, and for the sake of brevity we do not again set them forth here. The record conclusively establishes, however, that Appellees relied upon these orders, rulings and interpretations in maintaining their overtime pay policies.

The general situation was expressed in a letter from Lt. Col. F. G. Erie, Corps of Engineers, Acting District Engineer, Representative of the Alaskan Department, in a letter addressed to the U. S. Engineers Office at Seattle, Washington, under date of November 15, 1944, which came to the attention of Appellees, as a part of Exhibit 55, as follows:

> "The policies governing payments to non-manual employees were determined in Washington and instructions in the matter were issued to this office by the Chief of Engineers in Circular Letter No. 2236, dated 9 January 1943, and Circular Letter No. 2390, dated 13 May 1943."

These "policies" were conveyed to Appellees by the many exhibits in this case and formed the basis for their overtime pay practices.

The Appellants "grasping at straws" have argued that since many of the rulings, orders, interpretations, etc., relied upon by Appellees do not specifically refer to the Fair Labor Standards Act, they could not form the basis of good faith reliance. Again this argument is founded upon fallacious reasoning. The subject matter of the Fair Labor Standards Act is basic pay rates, hours of work and overtime pay. Similarly, each of the exhibits relied upon by Appellees deals with the precise subject matter. If it is to be presumed that Appellees are chargeable with knowledge of all laws, it must even more be presumed that an agency of the United States is familiar with such laws and has considered the same in formulating its actions and policies. Accordingly, it cannot be said that Appellees were not, and are not, entitled to place reliance upon an order, ruling, approval or interpretation from an agency of the United States dealing with the exact subject matter of the Fair Labor Standards Act merely because such order, ruling, approval or interpretation failed to expressly refer to the Act by name.

Appellant's briefs imply that the pay practices of the Appellees were established by the Appellees, at the direction of the War Department, with the intention of violating the Fair Labor Standards Act or with knowledge that the pay practices constituted a violation of the Act. This contention is entirely at variance with the facts. The Appellees

and the War Department were concerned with compliance with *all* laws and regulations of the United States which were deemed applicable to these projects. (See Ex. 13, Art. V. 1, b). Procedures were provided by which the War Department undertook to insure expeditious handling of all problems relating to labor for all C.P.F.F. contractors involved in operations throughout the United States (Ex. 20 and 21, supra, p. 5).

Appellants cite at page 53 of their brief (No. 11983) the case of *Timberlake v. Day & Zimmerman,* D.C.S.D. Iowa, 49 F. Supp. 28, as a decision which should have informed Appellees that their particular operations were subject to the Fair Labor Standards Act. Suffice it to say that the *Timberlake* case had nothing whatsoever to do with employees engaged in original construction of bases to be used exclusively for military purposes and the facts there had no similarity to the facts in these cases now on appeal.

The simple and undisputed fact is that in 1943, and throughout the life of the projects on which Appellees were engaged, neither the War Department nor Appellees considered that the Fair Labor Standards Act was applicable to employees engaged in original construction of air bases to be used for military purposes only. (R. 141, 142). See *Curtis v. McWilliams Dredging Company,* 78 N.Y.S. (2d) 317. Not only was the applicability of the Fair Labor Standards Act to operations of this type undecided in 1943, 1944 and 1945—the problem has not been authoritatively resolved by the courts even today. The applicability of the Fair Labor Standards Act to both military construction and military manufacturing operations is still the subject of conflict and confusion among the courts. Compare *Bauler v. Pressed Steel Car Co.,* D.C.N.D. Ill., 15 Labor Cases ¶ 64751 with *Assel v. Hercules Powder Co.,* D.C.D. Kan., 15 Labor Cases ¶ 64829. Compare also *Bell v. Porter,* 6th

Cir., 159 F. (2d) 117 with *Kennedy v. Silas Mason Co.*, 5th Cir., 164 F. (2d) 1016, writ of certiorari granted and the case remanded to the district court without opinion on the merits in 334 U.S. 249. See also *Laudadio v. White Construction Co.*, 2d Cir., 163 F. (2d) 383; *Divins v. Hazeltine Electronics Corp.*, 2d Cir., 163 F. (2d) 100; *St. Johns River Shipbuilding Co. v. Adams*, 5th Cir., 164 F. (2d) 1012; *Ritch v. Puget Sound Bridge & Dredging Co.*, 9th Cir., 156 F. (2d) 334.

The latest pronouncement of the Supreme Court of the United States held that employees engaged in construction work on a military base are not covered by the Fair Labor Standards Act. *Murphey v. Reed, Nov.* 15, 1948— U. S.—, 93 L. Ed. Adv. Op. 91. The Court remanded the case to the district court with instructions to dismiss causes of action involving solely construction work and to reconsider other causes of action.

In the light of the uncertainty which still exists some four years later as to the applicability of the Fair Labor Standards Act to employees engaged in military construction in the Alaska Aleutian Islands Area, it cannot be said that Appellees did not act as reasonably prudent men in relying upon and conforming with the regulations, orders, rulings, approvals and interpretations of the United States War Department, Corps of Engineers of the United States War Department, and The War Department Wage Administration Agency with respect to their overtime pay policies. The trial court so believed, and accordingly found as a finding of fact, that the acts of the Appellees were "in good faith * * * and in reliance on Administrative regulations, orders, rulings, approvals and interpretations of * * * the United States War Department, The Corps of Engineers of the United States War Department, and The War Depart-

Wage Administration Agency." This finding is ovewhelmingly supported by the record.

III. The Appellees Are Entitled to Relief from Liquidated Damages under § 11 of the Portal-to-Portal Act of 1947.

Section 11 of the Portal-to-Portal Act specifies two conditions under which the Court may, in the exercise of its sound discretion, refuse to award liquidated damages. (See Appendix A, infra). The employer must show to the satisfaction of the Court below that (1) his act or omission was in good faith, and (2) he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act.

On this phase of the case the trial court specifically found that the Appellees had met these conditions. (No. 12017, R. 11-12; No. 11984-5, R. 18; No. 11983, R. 17; No. 12018, R. 55.) Again, Appellees point to the fact that both good faith and the reasonableness of the course pursued by Appellees are questions of fact resolved by the trial court in favor of Appellees. (Supra, p. 45).

It is also significant that upon the same documentary record and substantially the same testimony the Hon. Lloyd L. Black reached the same conclusion as the court below. See *Wood et al. v. Guy F. Atkinson Co.,* D.C.W.D. Wash., 14 Labor Cases ¶ 64,466.

On the record made in these cases now before this Court, and for the reasons set forth in the preceding pages of this brief, Appellees believe that they are relieved from liability under the provisions of § 9 of the Portal-to-Portal Act of 1947.

Upon this same record, *a fortiori* Appellees are relieved

under § 11 of that Act from liability for liquidated damages. In acting as they did upon the numerous and emphatic regulations, orders, rulings, approvals and interpretations of the War Department, the Corps of Engineers, and the Wage Administration Agency on the justified and reasonable belief that the original construction of military bases was not within the coverage of the Fair Labor Standards Act—a problem not even yet decisively resolved by our courts, (see pp. 50 to 52, supra)—Appellees have demonstrated their grounds for relief under § 11.

Suffice it to say that the courts have granted relief under § 11 to others on a far less convincing evidentiary showing. *Central Missouri Telephone Co. v. Conwell,* 8th Cir., 170 F. (2d) 641: *Rogers Cartage Co. v. Reynolds,* 6th Cir., 166 F. (2d) 317; *Ispass v. Pyramid Motor Freight Corporation,* D.C.S.D.N.Y., 78 F. Supp. 475; *Burke v. Mesta Machine Co.,* D.C.W.D. Pa., 79 F. Supp. 588; *Bauler v. Pressed Steel Car Co.,* D.C.N.D. Ill., 15 Labor Cases ¶ 64,751; *Jackson v. Northwest Airlines,* D.C.D. Minn., 76 F. Supp. 121.

CONCLUSION

The Appellees respectfully urge, in accord with the unanimous declaration of the Federal Courts, that §§ 9 and 11 of the Portal-to-Portal Act of 1947 are constitutional.

The record in these causes amply demonstrates that all practices of the Appellees with respect to the payment of overtime compensation to Appellants or Appellants' assignors were in good faith in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretations of the War Department, the Corps of Engineers, and the Wage Administration Agency, and that Appellees had reasonable

grounds for believing that their practices were not a violation of the Fair Labor Standards Act of 1938, as amended.

Therefore, the judgment of the trial court in each of these causes should be affirmed.

Respectfully submitted,

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APPENDIX A

Sections 9 and 11 of the Portal-to-Portal Act of 1947 provide as follows (Title 29 U.S.C.A. §§ 258 and 260):

"§ 258. Reliance on past administrative rulings, etc.

In any action or proceeding commenced prior to or on or after May 14, 1947 based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. May 14, 1947, c. 52. § 9, 61 Stat. 88."

"§ 260. Liquidated damages.

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (b) of this title. May 14, 1947, c. 52 § 11, 61 Stat. 89."

APPENDIX B

For the convenience of the Court we have set forth in this Appendix B the material portions of those exhibits which are not quoted extensively elsewhere in this Brief and which best illustrate the documents and communications between Appellees and the War Department, the Corps of Engineers, and the Wage Administration Agency relating to overtime pay problems.

EXHIBIT 14

WAR DEPARTMENT
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON

January 9, 1943

CIRCULAR LETTER No. 2236
(Labor Relations Branch No. 8)

Subject: Policy of the Construction Division for Non-Manual Employees on Fixed-Fee, Architect-Engineer, and Construction Contracts.

To: All Concerned.

1. The following requirements as to the hours of work, overtime allowances, and provisions for leave accrual for all non-manual employees of cost-plus-a-fixed-fee principal and subcontractors in connection with the construction projects will be included in all future negotiations for such contracts (See Exhibits Nos. 10, 11 and 12, Contract Negotiations Manual). The provisions of subparagraphs *a* to *l*, inclusive, of paragraph 5, below, now appear in "Appendix C", incorporated in and made a part of W.D. Contract Forms Nos. 3, 4 and 12, as set forth in Procurement Regulations, and also appear in the same contract forms as Exhibits 17, 16 and 18, respectively, of the Contract Negotiations Manual.

2. Attention is invited to the fact that subparargaphs *a* to *l*, inclusive, of paragraph 5 below, have been prescribed

as contract provisions by Headquarters, Services of Supply, as indicated in Procurement Regulations, and no material deviation therefrom can be made without the approval of that Headquarters. The provisions of subparagraphs m to r, inclusive, of paragraph 5, below, prescribed by the Chief of Engineers must be adhered to in negotiating and administering all cost-plus-a-fixed-fee principal and subcontracts in connection with construction, except in extraordinary cases where authority to deviate therefrom has been obtained in advance from the Division Engineer.

3. Attention is invited to the fact that those portions of subparagraphs a to l, inclusive, of paragraph 5, below, which prescribe double time for work on the seventh consecutive day and time and one-half for work on the specified holidays, are derived from Executive Order 9240, and compliance therewith since October 1, 1942, is mandatory. All salary schedules containing provisions relative to overtime or premium payments which have heretofore been prescribed or approved in connection with any contract and which provisions might be considered to be in any manner inconsistent with the mandatory provisions of Executive Order 9240, as listed above, are hereby modified to the extent necessary to permit compliance with the mandatory provisions of that Executive Order. For record evidence of modification of such provisions, a copy of this circular letter shall be filed with the Contracting Officers' and Disbursing Officers' copies of the contract.

4. The policies set forth in subparagraph *a* to *r*, inclusive, of paragraph 5, below, shall be applicable to all cost-plus-a-fixed-fee principal and subcontracts hereafter placed in connection with construction activities.

5. Requirements as to hours of work, overtime and leave allowances for non-manual employees of cost-plus-a-fixed-fee principal and subcontractors:

a. "Non-manual employees" are those employees who are not "Laborers and mechanics" within the meaning of the Davis-Bacon Act. Specifically, the term "non-manual employees" has been interpreted to include all occupations not involving manual labor directly in connection with construction work. The following is a list (not all-inclusive) of typical "non-manual" occupations:

* * *

b. For this purpose, non-manual employees will be classified in the following groups:

* * *

(2) Group "B". Employees whose base salaries are between $50.00 and $90.00 per week, inclusive, except those included in groups "D" and "E".

(3) Group "C". Employees whose base salaries are in excess of $90.00 per week, except those included in Groups "D" and "E".

* * *

c. The base salaries of *all* employees of Groups "A", "B" and "C" will be established on the basis of a minimum work week of 48 hours.

* * *

e. Group B Employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they are required to perform on the seventh consecutive day.

f. Group "C" Employees will be considered supervisory or executive employees, and will be expected to work any necessary number of hours (including work on Sundays) without payment of additional compensation.

6. At the time of the assignment of a non-manual employee, each cost-plus-a-fixed-fee principal or subcontractor shall furnish such employee with a statement of the conditions of his employment in conformity with the provisions of this circular letter and such deviations from subparagraphs *m* to *r*, inclusive, of paragraph 5, above, as the Division Engineer may have authorized. This statement, insofar as practicable, shall follow the attached form (see inclosure 2).

7. Labor Relations Officers will attend all contract negotiations, as required, for the purpose of providing information regarding the employment and salaries of contractors' employees. Negotiations held in Washington will be attended by the Chief of the Labor Relations Branch, or his designated representative; negotiations held in the field will be attended by the Division Labor Relations Officer.

By order of the Chief of Engineers:

/s/ C. D. Barker
Lt. Col., Corps of Engineers
Chief, Labor Relations Branch,
Construction Division.

EXHIBIT 15

WAR DEPARTMENT
ARMY SERVICE FORCES
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON

May 13, 1943

CIRCULAR LETTER No. 2390
Labor Relations Branch No. 16

Subject: Policy for Non-Manual Employees on Cost-Plus-A-Fixed-Fee Architect-Engineer and Construction Contracts.

To: All Concerned.

* * *

2. The instructions below shall be followed in the negotiation and administration of cost-plus-a-fixed-fee principal and subcontracts thereunder negotiated on or after May 1, 1943. Where necessary, because of extraordinary conditions, authority to deviate therefrom shall be obtained in advance from this office. Circular letter No. 2236 (Labor Relations Branch No. 8) dated January 9, 1943, shall not be applicable to contracts negotiated on or after May, 1943.

3. The following provisions regarding eligibility for employment, hours of work, salaries, overtime and holiday payments, and leave privileges for all non-manual employees in connection with construction projects will be included in the record of all future negotiations for cost-plus-a-fixed-fee principal and subcontracts.

a. *Definition and Classification of Non-Manual Employees*:

(1) "Non-Manual employees" are those employees who are not "laborers and mechanics" within the meaning of the Davis-Bacon Act. Specifically, the term "non-manual employees" has been interpreted to include all occupations not in-

volving manual labor directly in connection with construction work. Custodial employees are included within the term "non-manual employees." The following is a list (not all inclusive) of typical "non-manual" occupations:

* * *

(2) Non-Manual employees will be classified in the following groups:

* * *

(b) Group "B", Employees whose base salaries are over $53.31 and not over $90.00 per week.

(c) Group "C", Employees whose base salaries are over $90.00 per week.

* * *

c. *Base Salaries*:

(1) The base salaries of all employees in Group "A" and "B" will be established on the basis of a work week of 40 hours. The base salaries of all employees in Group "C" will be established on the basis of a minimum work week of 48 hours.

* * *

f. *Overtime Payments*:

* * *

(2) Group "B" employees will be paid at the rate of straight time for all work which they are required to perform in excess of 40 hours per week.

(3) Group "C" employees will work any necessary number of hours (including work on Sundays) without payment of additional compensation.

4. At the time of the assignment of a non-manual employee, each cost-plus-a-fixed-fee principal or subcontractor shall furnish such employee with a statement of the conditions of his employment in conformity with the provisions of this circular letter and such deviations as may have been authorized. This statement, insofar as practicable, shall follow the attached form (see inclosure No. 2).

5. Labor Relations Officers will attend all contract negotiations, as required, for the purpose of providing information regarding the employment and salaries of contractors' employees. Negotiations held in Washington will be attended by the Chief of the Labor Relations Branch, or his designated representative; negotiations held in the field will be attended by the Division Labor Relations Officer.

* * *

7. The provisions of this circular letter shall not apply to employees engaged on work prosecuted outside the continental limits of the United States.

By order of the Chief of Engineers:

/s/ C. D. Barker
Lt. Col., Corps of Engineers,
Chief, Labor Relations Branch,
Construction Division

EXHIBIT 16
(Part 1)
ALASKA

WAR DEPARTMENT
WAGE ADMINISTRATION AGENCY
WASHINGTON, D. C.

27 April, 1944

Subject: Salary Schedule for Non-Manual Employees working in Alaska on Cost-Plus-a-Fixed-Fee Construction Projects.

To: Commanding General, Alaska Department,
Thru: Chief, Base Echelon, Alaskan Department
1331 3rd Avenue Building, Seattle, Washington

To: Commanding General, Northwest Service Command.
Thru: Chief of Engineers, Washington, D. C.

1. Under authority granted to the War Department Wage Administration in connection with Executive Orders No. 9250 and No. 9328 by the National War Labor Board (General Order No. 14) and by the Commissioner of Internal Revenue (Letter of 24 December 1942) the following action is taken on the request for a uniform non-manual wage structure in Alaska.

2. Reference is made to 1st Indorsement dated 12 April 1944, from Chief, Base Echelon, to the basic letter, dated 12 April 1944, from the Seattle District Engineer on behalf of the Contracting Officer, Alaskan Department, Subject: "Approval of Salary Ranges of Non-Manual Employees of Cost-Plus-a-Fixed-Fee Contractors Engaged in Construction of Military Facilities for the Alaskan Department, U. S. Army." Reference is also made to the supplemental transmittal letter, dated 20 April 1944, from Mr. J. I. Noble for the Engineer, Alaskan Department, Subject: "Policy of the Alaskan Department governing Non-manual Employees of

C.P.F.F. Contractors." Further reference is made to discussions held by this office with Mr. J. I. Noble and the Labor Officer of the Northwest Service Command.

3. Approval is hereby given to the inclosed salary schedule and statement of policy governing Non-Manual Employees of C.P.F.F. Architect-Engineer and Construction Contractors on work in Alaska under the jurisdiction of the Alaskan Department, effective on all contracts awarded after 15 September 1943, and on work in Alaska under the jurisdiction of the Northwest Service Command, effective on contracts awarded after the date hereof. In accordance with War Department Memorandum No. W 600-44 dated 25 March 1944 the same salary schedule and statement of policy will be effective on all future C.P.F.F. Contracts employing citizens of the United States in Canada under the jurisdiction of the Northwest Service Command.

4. The Agency has examined the rates which the contractors have been paying their employees between 15 September 1943, and the date of his ruling and hereby approves those rates for such employees. Also, in this interval, the old job designations have been used on some of the payrolls, the equivalent old designations being as shown on the organization charts inclosed with the reference basic letter. Such use of old designations is hereby approved on such payrolls as have been already processed too far to recall for correction.

5. Attention is invited to the fact that the War Department Wage Administration Agency has been granted specific authority, by agreement between the National War Labor Board and the 12th Regional War Labor Board, to take jurisdiction over the request of the Alaskan Department and the Northwest Service Command for approval of the schedule and policies referred to in paragraph 3 above. This authority was granted the Agency as a result of a telephone

conversation on 20 April 1944, between Dr. G. B. Noble, Chairman of the 12th Regional War Labor Board, Mr. Robert W. Burns of the National War Labor Board and Mr. E. A. Hammesfahr, Assistant to Dr. George W. Taylor, Vice-Chairman of the National War Labor Board.

By Order of the Secretary of War:

The War Department Wage Administration Agency.

/s/ JOHN R. ABERSOLD
John R. Abersold
Chief

* * *

3. Inclosures:

1. "Statement of Policy Governing Cost-Plus-a-Fixed-Fee Contractors Non-Manual Employees Working in Alaska."

2. "Non-Manual Salary Schedule for Alaska Job Site and Supporting Offices in Mainland Alaska Towns."

3. "Job Descriptions—Non-Manual Employees of Cost-Plus-a-Fixed-Fee Principal and Subcontractors."

Statement of Policy Governing Cost-Plus-a-Fixed-Fee Contractors Non-Manual Employees Working in *Alaska*

1. The following conditions as to the hours of work, overtime, allowances, and provisions for leave accrual for non-manual employees of cost-plus-a-fixed-fee principal and subcontractors in connection with construction projects in Alaska will be included in all negotiations for such contracts under the jurisdiction of the Alaskan Department and the Northwest Service Command. These conditions apply only to non-manual employees the principal part of whose work under the contract is performed within the territory of Alaska or in that part of Canada under the jurisdiction of the Northwest Service Command.

2. "Non-Manual employees" are those employees who are not "laborers and mechanics" within the meaning of the Davis-Bacon Act. Specifically, the term "non-manual employees" has been interpreted to include all occupations not involving manual labor directly in connection with construction work. * * *

3. For this purpose, non-manual employees will be classified in the following groups:

* * *

b. Group "B". Employees whose base salaries are between $50.00 and $90.00 per week, inclusive, except those included in Groups "D" and "E".

c. Group "C". Employees whose base salaries are in excess of $90.00 per week, except those included in Groups "D" and "E".

* * *

4. The base salaries of *all* employees of Groups "A", "B", "C" and "E" will be established on the basis of a minimum work week of 48 hours. Base wages of culinary employees are established on a daily shift of eight hours.

The straight time hourly rate shall be the daily shift wage divided by 8, the weekly salary divided by 48, the monthly salary divided by 208 or the yearly salary divided by 2496.

* * *

6. Group "B" employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. They will be paid at the rate of two times straight time for all work which they are required to perform on the seventh consecutive day worked in the scheduled work week.

7. Group "C" employees will be considered supervisory or executive employees, and will be expected to work any necessary number of hours (including work on the seventh day) without payment of additional compensation.

EXHIBIT 16
(Part 2)
SEATTLE

WAR DEPARTMENT
WAGE ADMINISTRATION AGENCY
WASHINGTON, D. C.

27 April 1944

Subject: Salary Schedule for Non-Manual Employees Performing Work in Seattle Headquarters Offices of the C.P.F.F. Architect-Engineer and Construction Contractors under the Jurisdiction of the Alaskan Department.

To: Commanding General, Alaskan Department,
Thru: Chief, Base Echelon, Alaskan Department,
1331 Third Avenue Building, Seattle, Washington

1. Under authority granted to the War Department Wage Administration Agency in connection with Executive Orders No. 9250 and No. 9328 by the National War Labor Board (General Order No. 14) and by the Commissioner of

Internal Revenue (Letter of 24 December 1942) the following action is taken on the request of the Alaskan Department for a uniform non-manual wage structure.

2. Reference is made to 1st Indorsement dated 12 April 1944, from Chief, Alaskan Base Echelon, to basic letter, dated 12 April 1944 from Seattle District Engineer on behalf of the Contracting Officer, Alaskan Department, Subject: "Approval of Salary Ranges of Non-Manual Employees of Cost-Plus-a-Fixed-Fee Contractors Engaged in Construction of Military Facilities for the Alaskan Department, U. S. Army" and to the supplemental transmittal letter, dated 20 April 1944, from Mr. J. I. Noble for the Engineer, Alaskan Department, Subject: "Policy of the Alaskan Department Governing Non-Manual Employees of C.P.F.F. Contractors."

3. Approval is hereby given to the inclosed salary schedule and the statement of policy governing Non-Manual Employees engaged in work in the Seattle Headquarters Offices of C.P.F.F. Architect-Engineer and Construction Contractors in connection with contracts under the jurisdiction of the Alaskan Department, Subject to the following provisions:

a. This approval is to be effective on all work performed in the said offices beginning 1 November 1943 whether such work is in connection with new contracts or with completion of existing contracts.

b. Between the dates of the new contracts, 30 September 1943, and the conversion to the new basic work week on 1 November 1943, work is authorized on the new contracts under the salary schedules and employment policies existing on the old contracts, it being understood that the old employees carried the majority of the new work during this period.

c. In the case of new hires in those designations on the inclosed salary schedule which are marked with an asterisk (*) the contractor shall begin the employees

at, or near, the minimum rate shown except that, when the applicant possesses exceptional skill or qualifications, the contracting officer may approve an appropriate starting salary within the approved range.

f. The Agency has examined the rates which the contractors have been paying their employees between the effective dates as outlined above and the date of this ruling and hereby approves those rates for such employees. Also, in this interval, the old job designations have been used on some of the payrolls, the equivalent old designations being as shown on the organization charts inclosed with the reference basic letter. Such use of old designations is hereby approved on such payrolls as have been already processed too far to recall for correction.

By Order of the Secretary of War:

The War Department Wage Administration Agency

/s/ JOHN R. ABERSOLD
John R. Abersold
Chief

* * *

3. Inclosures:

1. "Statement of Policy Governing Cost-Plus-a-Fixed-Fee Contractors Non-Manual Employees Working in Continental United States on Contracts under the jurisdiction of the Alaskan Department."
2. "Non-Manual Salary Schedule for Seattle Headquarters Offices of Cost-Plus-a-Fixed-Fee Contractors on Alaskan Military Construction."
3. "Job Descriptions—Non-Manual Employees of Cost-Plus-a-Fixed-Fee Principal and Subcontractors."

WAR DEPARTMENT
ALASKAN DEPARTMENT

Statement of Policy Governing Cost-Plus-a-Fixed-Fee Contractors' Non-Manual Employees Working in Continental United States on Contracts Under the Jurisdiction of the Alaskan Department

1. The following provisions shall apply to all non-manual employees working in the Seattle Headquarters Offices of Cost-Plus-a-Fixed-Fee prime contractors and sub-contractors engaged on military construction contracts under the jurisdiction of the Alaskan Department. These conditions shall also apply to any sub-project work in continental United States that is performed as a part of, or in support of, Alaskan construction, except that, for sub-projects in areas other than Seattle, the salary schedules applied to the work shall have individual approval of the War Department Wage Administration Agency. Negotiations are now in progress to extend the work of present Alaskan contractors to new projects and the existing Seattle Staffs will be expected to start the new work while completing the old. It is therefore required that these provisions shall be put into effect in the offices of such contractors as soon as conversion to the new basic work week and salaries can be conveniently effected. In any event the conversion shall be accomplished by 1 November 1943 and shall embrace all employees whether engaged full time on the new projects or not. All future contractors under the jurisdiction of the Alaskan Department will be governed by these provisions until and unless deviations are authorized by the Commanding General.

2. *Definition and Classification of Non-Manual Employees*:

   a. "Non-manual employees" are those employees who are not "laborers and mechanics" within the meaning of the Davis-Bacon Act. Specifically, the

term "non-manual employees" has been interpreted to include all occupations not involving manual labor directly in connection with construction work. * * *

* * *

b. Non-manual employees will be classified in the following groups:

* * *

(2) Group "B". Employees whose base salaries are over $53.31 and not over $90.00 per week.

(3) Group "C". Employees whose base salaries are over $90.00 per week.

* * *

4. *Base Salaries*:

a. The base salaries of all employees in Groups "A" and "B" will be established on the basis of a work week of 40 hours. (The straight time hourly rate for such employees shall be the approved weekly rate divided by 40.) The base salaries of all employees in Group "C" will be established on the basis of the regularly established work week of the contractor involved.

* * *

7. Overtime Payments:

b. Group "B" employees will be paid at the rate of straight time for all work which they are required to perform in excess of 40 hours during the first six days worked of any regular scheduled work week, and at the rate of two times straight time for all work which they are required to perform on the seventh day worked of such work week.

* * *

d. Group "C" employees will work any necessary number of hours (including work on the seventh day) without payment of additional compensation.

EXHIBIT 17

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON

August 27, 1942

GUY F. ATKINSON Co.
O'Shea Bldg.,
Seattle, Wash.
Attention: Mr. Doyle

Gentlemen:

The following policy of the Office, Chief of Engineers in relation to working conditions of non-manual employees of all cost-plus-a-fixed-fee contractors is hereby authorized on your contract No. W-869-eng-7100:

a. Group A. Employees whose base salaries are less than $50 per week wil be paid at the rate of straight time for all work they are requested to perform in excess of 44 hours per week.

b. Group B. Employees whose basic salaries are between $50 and $90 per week will be expected to work any reasonable number of hours 5½ days per week without payment of additional compensation. They will be paid straight time (the weekly salary divided by 44) for all work which they are required to perform in excess of 5½ days and on the seventh day.

c. Group C. Employees will be considered key employees and will be expected to work any necessary number of hours (including work on the seventh day) without additional compensation.

The above policy is mandatory and will be strictly adhered to.

For the District Engineer:

Very truly yours,

/s/ A. B. SMITH,
Captain, Corps of Engineers,
Executive Assistant.

EXHIBIT 19

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON

February 20, 1943

Guy F. Atkinson Company,
Contract W-869-eng-7100
1524 Fifth Avenue
Seattle, Washington

Gentlemen:

Confirming verbal advice to Mr. Guy F. Atkinson relative to the employment of non-manual employees on Contract W-869-eng-7100, you are hereby advised that the Officer in Charge of Alaska Construction has directed that the policy outlined in the inclosed Circular Letter 2236 shall apply with the exception of the salary schedule attached thereto, also that the wording "Officer in Charge of Alaska Construction" shall be substituted for District Engineer in paragraph 5k and that paragraph 51 shall be inapplicable.

For the District Engineer:

Very truly yours,

/s/ J. D. Lang
J. D. Lang,
Lt. Col., Corps of Engineers,
Executive Officer — Alaska Services.

EXHIBIT 22

GUY F. ATKINSON COMPANY

October 20, 1943

The District Engineer
United States Engineer Office
700 Central Building
Seattle, Washington

Attention: Chief, Alaska Operations Division

Subject: Field Organization Schedule Adak Depot Project Alaska Contract No. W 45-108-eng 202

Dear Sirs:

We submit herewith for approval, schedule of classifications and weekly salary ranges covering all anticipated non-manual administrative, supervisory and clerical positions for our work on the Adak Depot Project.

* * *

The rate schedule as submitted represents a description of like rate schedules which have been already approved and in effect on previous work in Alaska, and were established for a basic 48-hour week and on a contemplated 7 day, 56 hours per week job operation. Included in this rate schedule are a few rates under which gross inequities and serious difficulties were encountered on the Alaska Barge Terminal Project, for the reason that regulations prescribing computation of overtime earnings, promulgated after the establishment of this rate schedule, resulted in responsible administrative and supervisory personnel receiving considerably less than their assistants or even less than comparatively low-rated manual workmen and foremen under their supervision.

* * *

We wish to emphasize the fact that we will undertake

to prosecute work on this Project to the best of our ability but that our performance must be contingent upon obtaining approval of a schedule of rates that will enable us to secure and retain the necessary administrative and supervisory personnel, as well as laborers and skilled workmen.

Very truly yours,

GUY F. ATKINSON COMPANY
/s/ Guy F. Atkinson
Chairman of the Board

EXHIBIT 24

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON

29 Oct. 43

Guy F. Atkinson Company
O'Shea Building
Seattle, Washington

Gentlemen:

You are directed on or before 1 November 1943 to effect in your Seattle Office, servicing contracts in Alaska, the following policy:

* * *

c. . . . On those employees whose base salaries are over $53.31 and not over $90.00 per week, straight time shall be paid for all work required in excess of 40 hours per week the first 6 days of the scheduled work week and will be paid at two times the straight time for all work performed on the seventh consecutive day of the scheduled work week.

* * *

You are further directed to work all employees 5½ days per week or 44 hours.

The above shall apply to your work under contract W-869-eng-7100 and will be used as a basis for approvals of employees shifted to work under contract W-45-108-eng-202.

Very truly yours,

/s/ George F. Tait
George F. Tait
Major, Corps of Engineers,
Contracting Officer.

EXHIBIT 25

5 November 1943

Guy F. Atkinson Company
1524 Fifth Avenue
Seattle, Washington

Subject: Field Organization Schedule, Adak Depot Project, Alaska Contract W45-108-eng-202.

Gentlemen:

Reference is made to your letter on the above subject dated 20 October 1943, wherein approval of Field Organization Chart (Drawing No. 1002-B) and Organization Schedule for the Adak Depot Project is requested.

You are advised that your letter with inclosures was forwarded to the Engineer, Alaskan Department, by letter dated 20 October 1943, file SE 161 (Adak Depot 202.5) 1 PADBL 2Y. In first indorsement thereto, dated 24 October 1943, the Engineer, Alaskan Department, approved the Organization Chart and Schedule without change and recommended that action be taken to adjust the salary range for Assistant Superintendents as proposed in your letter.

In order to obtain approval for adjustment in an estab-

lished salary range, it will be necessary that your office prepare appropriate request on forms prescribed by the Treasury Department for submitting to higher authority. This office will furnish the necessary forms and assist in forwarding your request through proper government channels.

Very truly yours,

/s/ George F. Tait
George F. Tait,
Major, Corps of Engineers,
Contracting Officer.

EXHIBIT 26

November 15, 1943

The District Engineer
United States Engineering Office
700 Central Building
Seattle 4, Washington

Attention: Contracting Officer, Contract No. W-45-108-eng-202

Subject: Adak Headquarters Organization Schedule—Adak Depot Project Contract No. W-45-108-eng-202

Dear Sir:

We submit herewith for approval, schedule of classifications and weekly salary ranges covering all anticipated non-manual administrative, supervisory, clerical and engineering positions for our Seattle Headquarters Office, in connection with the Adak Depot Project.

The various features of the foregoing schedule of classifications and salary ranges are essentially the same as applied to our Alaska Barge Terminal Project, and have been under thorough discussion with your representatives during the

past several weeks. In order that our employment and payroll records may be cleared and brought up to date, we would appreciate receiving your consideration, approval, and any further instructions, at your earliest convenience.

Yours very truly,

GUY F. ATKINSON COMPANY
/s/ RAY H. NORTHCUTT
Ray H. Northcutt
Project Manager

EXHIBIT 27

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON

30 November 1943

Guy F. Atkinson Company,
1524 Fifth Avenue
Seattle, Washington

Subject: Organization Schedule, Seattle Headquarters Office.

Gentlemen:

Reference is made to your letter of 15 November 1943 wherein you request approval of schedule of classifications and weekly salary ranges for positions in your Seattle Headquarters Office in connection with Contract W-45-108-eng-202.

* * *

With the exception of the salary range for Personnel Manager, the organization schedule as submitted in your letter is approved and authorized for use effective 1 November 1943. Also approved is the organization chart identified as Drawing No. 1002-A, dated 14 November 1943, which accompanied the range schedule.

Until such time as approval is received from the War

Labor Board to increase the salary range for the Personnel Manager, the approved range shall be considered to be $80-$100, consistent with established rates for this classification.

Very truly yours,

/s/ George F. Tait
George F. Tait,
Major, Corps of Engineers,
Contracting Officer.

EXHIBIT 33

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON

12 Feb. 1944

Birch-M. K.
330 Central Building
Seattle 4, Washington

Gentlemen:

Reference is made to your letter of 27 January 1944, requesting authority to operate your Seattle Office on a 48-hour per week basis.

Base salaries not exceeding $90 per week are to apply to a 40-hour work week. For such employees, you are authorized 8 hours overtime on the sixth day worked as long as, or at such time as, they can be usefully employed. Required work in excess of eight hours per day, and/or 48 hours per week, shall be considered extraordinary overtime and shall be reimbursable only with the prior approval of the Contracting Officer. Requests for a prior approval shall be made on an approved form, listing the individuals involved, the anticipated extent of the overtime, and a sufficient and valid

reason therefor. Completion of the day's regular duties shall not be considered a valid reason for overtime.

Overtime pay shall be in accordance with the Chief of Engineer's Circular Letter 2390, a copy of which has already been furnished to you.

Base salaries exceeding $90 per week shall constitute full compensation for all work necessary in the perfomance of the employee's duties and functions. Employees who are predominantly administrative or supervisory are intended to be in this group.

Very truly yours,

/s/ George F. Tait
George F. Tait,
Major, Corps of Engineers,
Contracting Officer.

EXHIBIT 34

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON

13 February 1944

Birch-M. K.
330 Central Building
Seattle 4, Washington

Gentlemen:

Reference is made to your letter of 27 January 1944, requesting approval of the establishment of a 70-hour work week for the office employees of yourselves and your subcontractors at the site of the work on your three contracts in the Aleutians.

In accordance with the terms of the contracts, it is anticipated that the work will be carried on in two shifts of 10 hours each daily. However, this schedule is subject to ad-

justment according to the availability of men and materials, weather conditions, changes of program, hazards of war, and the like. It will be necessary for your non-manual employees to work any reasonable number of hours per day during the first six days of a week to fulfill their functions. However, no overtime benefits shall accrue on the first six days. Under normal conditions it will be necessary for the non-manual employees to continue their operations of two 10-hour shifts on the seventh day of the work week to keep pace with the manual operations, and double time will be paid Class B employees for work performed on the seventh consecutive day of the work week. This does not mean that every non-manual employee will be paid for 20 hours work on the seventh day, whether or not there is gainful work to be done. Seventh day work for non-manual employees is therefore authorized, subject to the requirements of the work as determined by the authorized representative of the Contracting Officer in direct charge of the work at the job site.

Very truly yours,

/s/ George F. Tait
George F. Tait,
Major, Corps of Engineers,
Contracting Officer.

EXHIBIT 39

202 JOB OFFICE

March 18, 1944

To: The Resident Engineer, A.P.O. No. 980, U.S. Army
From: Guy F. Atkinson Company, 202 Job Office

Re: Non-Manual Employees

Under the labor provisions of our contract, Article 8, paragraph b., Group "B" employees are expected to work any reasonable number of hours during the first six of the work week at straight time. We believe the interpretation of "reasonable number" to be eight hours.

In the interest of economy and general efficiency on the job, it is our opinion that numbers of non-manual employees in Group "B" be required to work ten hours per day to conform to the hours of work of manual employees over whom the non-manual employees are exercising checking supervision. For the additional two hours per day we believe the non-manual employees are entitled to overtime payments in conformity with the provisions of the job contract and Executive Order No. 9240.

Your favorable consideration is earnestly solicited.

Yours very truly,

Guy F. Atkinson Company
E. B. Skeels
Job Manager

EXHIBIT 40

HEADQUARTERS ALASKAN DEPARTMENT
OFFICE OF THE ENGINEER
APO 942, C/O POSTMASTER, SEATTLE, WASHINGTON

5 April 1944 C

Guy F. Atkinson Company
APO 980 U. S. Army

Gentlemen:

Receipt of your letter of 18 March 1944 requesting approval for the payment of overtime to Group B non-manual employees is acknowledged.

Payment of overtime compensation to Group B non-manual employees would be in violation of Executive Order No. 9240. For the payment of overtime, Government regulations define Group B employees as follows:

> "Group B employees will be expected to work any reasonable number of hours six (6) days per week without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they are required to perform on the seventh consecutive day."

This stipulation under Executive Order No. 9240 was made a part of your Contract W 45-108-eng-202 and is contained in paragraph d, Article VIII thereof.

This factor was taken into consideration when the field organization schedule of non-manual employees under Contract W 45-108-eng-202 was established and approved for your Company. Accordingly, this Headquarters cannot approve the request contained in your letter of 18 March.

For the Engineer:

Very truly yours,

/s/ L. B. DeLong
L. B. DeLong,
Colonel, Corps of Engineers
Engineer, Construction Div.

EXHIBIT 43

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON

3 May 1944

Guy F. Atkinson Company
1524 Fifth Avenue
Seattle, Washington

Gentlemen:

Inclosed are copies of the rulings of the War Department Wage Administration Agency covering the non-manual wage structure of contractors for the Alaskan Department. These rulings are in three parts as follows:

a. Salary Schedule for Non-Manual Employees Working in Alaska on Cost-Plus-a-Fixed-Fee Construction Projects.

b. Salary Schedule for Non-Manual Employees Performing Work in Seattle Headquarters Offices of the Cost-Plus-a-Fixed Fee Architect-Engineer and Construction Contractors Under the Jurisdiction of the Alaskan Department.

c. Application of Employees Temporarily Assigned to Emergency Work at La Porte, Indiana of Salary Schedule for Non-Manual Employees of Seattle Headquarters Offices.

* * *

Very truly yours,

/s/ J. I. Noble
J. I. Noble,
Contracting Officer

EXHIBIT 48

POST HEADQUARTERS
OFFICE OF THE RESIDENT ENGINEER
APO 980, C/O POSTMASTER, SEATTLE, WASHINGTON

10 June 1944

Subject: Salary Schedule for non-manual employees working in Alaska on CPFF construction project.

To: CPFF Contractors, this station.

1. Reference is made to letter from this office dated 5 June 1944, which is rescinded and superseded by the following instructions:

"Effective immediately, classifications of non-manual employees, wage-rates and ranges for CPFF contracts, per schedule approved by the War Department Wage Agency over signature of John R. Abersold by letter to the Commanding General, Alaskan Department dated 27 April 1944 and forwarded to all CPFF Contractors with letter dated 2 May 1944 by J. I. Noble, Contracting Officer, all CPFF contracts will adopt subject approved schedule. Only designations will be changed as 1st step, with change over made effective first opportunity but not later than week commencing 11 June 1944. Any necessary new statements of employee status forms will be prepared and be completed in Seattle from payrolls as received there from project. No wage adjustments to be effective until classification changes and present operations cleared. By authority of Engineer, Alaskan Dept., Radiogram AECC 19 dated 9 June 1944."

2. The last sentence above is interpreted by this office that you are directed not to make any change in present base rate of pay now in effect.

J. M. McGreevy
Colonel, Corps of Engineers
Contracting Officer

EXHIBIT 58

From Robins Acting OCE Washington DC 311838z
To Seattle Engineer District Seattle Wash

GRNC

Reurlet dated 22 January 1945 subject applicability of Fair Labor Standards Act to CFPP contractors no regulations superseding circular letter 2390 have been issued claims of employees of CPFF contractors paid in accordance with C L 2390 should be investigated and reported as outlined in paragraph 750.23 orders and regulations end speed 9159

1851Z

Action Copy: Als Div.
US Engr Ofc
Jan 31 45 12 49A rw

EXHIBIT 59

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON

7 February 1945

Guy F. Atkinson Company
1524 Fifth Avenue
Seattle, Washington

Subject: Claims for Additional Compensation Under Fair Labor Standards Act.

Gentlemen:

By letter dated 3 October 1944 from the Contracting Officer, information was furnished to your office outlining the efforts of this office to establish an administrative policy for guidance in handling claims for additional compensation based on Fair Labor Standards Act regulations.

In response to our inquiry, the Office, Chief of Engineers

has recently re-affirmed previous instructions that regulations of Circular Letter 2390 are currently applicable to operations of Cost-Plus-a-Fixed-Fee Contractors. In view of these instructions, claims based on alleged violations of the Fair Labor Standards Act shall continue to be denied by the Contracting Officer.

* * *

Very truly yours,

/s/ D. M. PELTON
D. M. Pelton,
Captain, Corps of Engineers,
Contracting Officer

APPENDIX C

Analysis of Exhibits 1 to 12, Inclusive, and 80 Relating to the Authority of the Individuals Issuing or Signing the Documents and Communications Received by Appellees

(a) Authority of Commanding General, Alaska Defense Command, Engineer, Alaska Defense Command, the Contracting Officers, and District Engineer, Seattle, in Connection with Execution and Administration of Contracts prior to November 1, 1943.

Pursuant to the provisions of the First War Powers Act (50 U.S.C.A. App. § 611) the President conferred upon the Secretary of War the authority to negotiate contracts for military construction and provided that this authority might be exercised by such other officer or officers as the Secretary of War might designate. (Title I, Par. 1, Executive Order No. 9001, dated December 27, 1941; 6 F.R. 6787; 3 C.F.R. Cum. Supp. p. 1055; 50 U.S.C.A. App. p. 242; see also Army Procurement Regulations, 10 C.F.R. Cum. Supp. § 81.107, p. 3293).

By order of the Secretary of War, on March 11, 1942 there was vested in the Commanding General, Western Defense Command (hereinafter called C.G., W.D.C.) jurisdiction over Alaskan military construction in the following language:

> "a. Complete jurisdiction over and responsibility for military construction activities and real estate leases in Alaska, including administration of existing construction contracts and leases is vested in you."
>
> * * *
>
> "d. All military construction and real estate leasing activities of the Engineer Department, Division of District Engineer, in Alaska, are transferred to the jurisdiction of such engineer of your command as you may designate." (Ex. 1-A)

The Commanding General, Western Defense Command, was by this directive authorized to provide the effective date of this assumption of jurisdiction and he was also authorized to

> "designate the District Engineer, Seattle, to continue to perform, all, or such ones as you may wish, of the services he now performs in connection with construction and real estate matters in Alaska except command functions and contracting other than for supplies and materials. Some of the matters in which the Chief of Engineers believes the District Engineer, Seattle, may be of assistance and which you may wish him to continue to perform as at present, are design, fiscal, accounting, cost, procurement and personnel matters."

On April 21, 1942 the C.G., W.D.C. transferred certain portions of this jurisdiction to the Commanding General, Alaska Defense Command (hereinafter referred to as the C.G., A.D.C.) subject to the supervision of the C.G., W.D.C. in the following language (Ex. 1-B):

> "2. Effective midnight April 30-May 1, 1942, the Commanding General, Alaska Defense Command, under the Commanding General, Western Defense Command, will be responsible for the execution of Army construction projects and for leasing real estate in Alaska, including the projects being accomplished by the Navy Department at Sitka, Kodiak and Dutch Harbor. * * *
>
> "3. The Commanding General, Alaska Defense Command, will initiate construction projects in the following manner:
>
> * * *
>
> "5. The Area Engineer, Alaska, is designated the Officer in Charge of Alaska Construction. The Army Liaison Officer with Navy Contract No. 3570, designated as his assistant. Both these officers are placed under the Commanding General, Alaska Defense Command, for the purpose of carrying out this directive.

"8. Cost, progress, finance, personnel and other records, documents and periodic reports and cost accounting will be continued as at present *in accord with Engineer Department regulations,* and will be submitted to the Chief of Engineers in accordance with existing procedure.

* * *

"9. The Officer in Charge of Alaska Construction and designated *contracting officers in Alaska will be governed by the same procedure governing Corps Area and Department Engineers.*"

Thereafter the C.G., W.D.C. requested of the Chief of Engineers "that the District Engineer, Seattle, be designated to continue all of the services he now performs in connection with construction and real estate matters in Alaska, except command functions and contracting other than for supplies and materials" (Ex. 1-C). This request for the service of the District Engineer, Seattle, was granted by order of the Chief of Engineers under date of May 6, 1942 (Ex. 1-E).

Subsequent to the transfer of authority from the C.G., W.D.C. to the C.G., A.D.C. on April 21, 1942 (Ex. 1-B) the authority of the C.G., A.D.C. on May 4, 1942 was augmented in respects not here material (Ex. 3) and on July 17, 1943, a directive from the C.G., W.D.C. to the C.G., A.D.C. restated the authority of the C.G., A.D.C. as follows (Ex. 1-G):

"4. The Commanding General, Alaska Defense Command, under the Commanding General, Western Defense Command and Fourth Army, is responsible for execution of Army construction projects in Alaska * * *

* * *

"7. The District Engineer, Seattle, *in accordance with existing instructions from the Chief of Engineers* and the Division Engineer, Pacific Division, will continue the services he now performs in connection with military construction in Alaska.

"8. Cost, progress, finance, personnel, and other records, documents and periodic reports, and cost accounting will be continued as at present *in compliance with Engineer Department regulations,* and will be submitted to the Chief of Engineers in accordance with existing procedure.

"9. The Engineer, Alaska Defense Command and designated contracting officers in Alaska *will be governed by the procedure which governs Service Command and Department Engineers.*"

On August 23, 1943 all responsibilities for Alaska construction subject only to the limitations contained in the July 17 instructions were delegated to the C.G., A.D.C. (Ex. 1-H).

As of May 4, 1942 the Officer in Charge, Alaska Construction was appointed by the C.G., W.D.C. as contracting and certifying officer for military construction activities in Alaska with authority to designate other contracting and certifying officers (Ex. 2). This directive was superseded on July 17, 1943, the appointment being conferred upon the Engineer, Alaska Defense Command (Ex. 1-F).

The District Engineer, Seattle, was also appointed "as contracting and certifying officer for all contracts, other than supplies and materials, in connection with military construction activities and real estate leases in Alaska" with authority to designate other contracting and certifying officers (Ex. 1-D).

General G. J. Nold was assigned to duty as Engineer, Alaska Defense Command, September 5, 1941 (Ex. 4-B), reporting for duty October 2, 1941 (Ex. 4-A) and executed Contract 202 in such capacity, being responsible for the administration of the contract in this particular capacity until November 1, 1943.

(b) Authority of Commanding General, Alaska Department, Engineer, Alaska Department, the Contract-

ing Officers and District Engineer, Seattle, in Connection With Execution and Administration of Contracts Subsequent to November 1, 1943.

Pursuant to War Department General Order No. 67 (Ex. 5) the Alaska Department was established as a separate theatre of operations effective November 1, 1943 in the following language:

"1. Alaskan Department. —1. By direction of the President, effective 1 November, 1943, the Alaska Defense Command is redesignated the Alaskan Department * * *.

"2. The Alaskan Department is concurrently separated from the Western Defense Command and established as a separate theatre of operations under the War Department."

The letter of instructions by order of the Secretary of War to the Commanding General, Alaskan Department (Ex. 6) conferred upon the Commanding General, Alaskan Department (hereinafter referred to as C.G., A.D.) the authority previously exercised by the C.G., A.D.C., as follows:

"The delineation of the Command and the mission of the Alaskan Department remains as heretofore for the Alaska Defense Command."

The District Engineer, Seattle, was requested by the C.G., A.D. to continue to perform the same functions as had been performed for the C.G., A.D.C. in accordance with instructions set forth above from the C.G., W.D.C. to the C.G., A.D.C. on April 21, 1942 (Ex. 1-B) as revised on July 17, 1943 (Ex. 1-G):

"2. Effective 1 November 1943, in accordance with General Order No. 67, reference 1c, and under the provisions contained in letter from the Adjutant General, reference 1d, your office is requested to continue for the Commanding General, Alaskan Department, such services as were performed under the jurisdiction of the

> Commanding General, Western Defense Command, for the Commanding General, Alaska Defense Command, prior to this date, in connection with military construction in Alaska, *all in accordance with existing instructions from the Chief of Engineers and the Division Engineers, Pacific Division.*" (Ex. 7).

The District Engineer was instructed by the Chief of Engineers to act accordingly (Ex. 8.)

The relationship and functions of the Engineer, Alaskan Department (herein called Engineer, A.D.) and the District Engineer are discussed in memoranda from the Engineer, A.D. to the District Engineer, Seattle, dated October 5, 1944 (Ex. 9) and from the Engineer, A.D., to the Appellee, dated November 25, 1944 (Ex. 56).

Upon the creation of the Alaskan Department, General G. J. Nold, Engineer, A.D., was appointed "Contracting and Certifying Officer for Military Construction Activities and Real Estate Leases in Alaska" with full authority to designate other contracting and certifying officers (Ex. 80-E), having previously served in such capacity as Engineer, A.D.C. (Ex. 4-B). General Nold was replaced as of June 24, 1944 (Ex. 80-K) as such contracting and certifying officer by Col. DeLong (Ex. 80-L) who was in turn replaced by Col. Lang on November 10, 1944 (Ex. 80-N).

For all Contracts here involved Mr. J. I. Noble was "designated as authorized representative of the Contracting Officer with full authority in all things pertaining to the Contract" by General Nold (then Col. Nold). (Ex. 80-D, R. 377).

Numerous other individuals were designated from time to time as contracting officers who originated and signed various of the documents discussed above in the Statement of the Case. See the several designations contained in Ex-

hibits 80 (a) through (p). Also may be noted the following provisions in Contract 202 (Ex. 13):

"Article XIX—Definitions.

"* * *.

"3. Except for the original signing of this contract, and except as otherwise stated here, the term 'Contracting Officer' as used herein shall include his duly appointed successor or his authorized representative."

See likewise in this connection, Army Procurement Regulations, 10 C.F.R. Cum. Supp. § 81.302 (c), page 3331, authorizing the appointment of representatives by any contracting officer.